Supreme Court, U. S.
FILED
JUL 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-38

TOWNSHIP OF MOUNT LAUREL,
Appellant,

v.

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., CAMDEN COUNTY C.O.R.E., CAMDEN COUNTY N.A.A.C.P., GLADYS CLARK, BETTY WEAL and ANGEL PEREZ,

and

ETHEL LAWRENCE, THOMASINE LAWRENCE, CATHERINE STILL, MARY E. SMITH, SHIRLEY MORRIS and JACQUELINE CUSTIS,
Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the Supreme Court of New Jersey, dated March 24, 1975, is reported at 67 N. J. 151, 336

A. 2d 713 (1975). (A copy of the opinion and judgment of the New Jersey Supreme Court is attached hereto as Appendix A.) The opinion of the New Jersey Superior Court, Law Division, is reported at 119 N. J. Super. 164, 290 A. 2d 465 (Law Div. 1972). (A copy of the Law Division opinion is attached hereto as Appendix B and the accompanying Final Judgment and Order is attached hereto as Appendix C.)

Jurisdiction

Appellees instituted this action in lieu of prerogative writ in the New Jersey Superior Court, Law Division, challenging the constitutionality of the zoning and subdivision ordinances of the Township of Mount Laurel and the zoning enabling statute of the State of New Jersey under the due process and equal protection clauses of the fourteenth amendment to the U. S. Constitution and the New Jersey Constitution, article I, section 1. Plaintiffs contended that the ordinances were constitutionally infirm because they failed to provide for adequate low and moderate income housing both for residents of Mount Laurel and for non-residents who wished to live in Mount Laurel. The Superior Court, Law Division, entered judgment in favor of the plaintiffs on May 30, 1972, invalidating Mount Laurel's zoning ordinance in its entirety, and mandating that Mount Laurel amend its zoning ordinance to create a plan of implementation to fulfill the housing needs of low and moderate income persons: (a) residing in Mount Laurel, (b) presently employed by Mount Laurel or by commercial or industrial users in Mount Laurel, and (c) employed by or expected to be employed by Mount Laurel or by commercial and industrial users reasonably anticipated to be locating in Mount Laurel.

Mount Laurel appealed to the Superior Court of New Jersey, Appellate Division, and those plaintiffs who were not present or former residents of Mount Laurel cross-appealed, alleging that the trial court's decision failed to take adequate account of the housing needs of the region in which Mount Laurel is located.

The New Jersey Supreme Court certified the appeals on its own motion prior to argument in the Superior Court, Appellate Division. By opinion and judgment entered on March 24, 1975, it modified the judgment of the Superior Court, Law Division, holding that Mount Laurel's zoning provisions violated article I, section 1 of the New Jersey Constitution in that they failed to make adequate provision for the housing needs of low and moderate income persons in the region. Mount Laurel petitioned the New Jersey Supreme Court for a rehearing, which was denied by Order dated June 26, 1975.

Mount Laurel appeals from the decision of the New Jersey Supreme Court entered on March 24, 1975. It filed its Notice of Appeal to this Court with the Clerk of the Supreme Court of New Jersey on June 19, 1975.

The jurisdiction of this Court to review the judgment of the New Jersey Supreme Court is conferred by 28 U.S.C. section 1257(2). The following cases sustain the jurisdiction of this Court to review that judgment: *Lathrope* v. *Donohue,* 367 U. S. 820, 824-27 (1961); *Hamilton* v. *Regents of University,* 293 U. S. 245, 257 (1934); *Great Northern Railway Company* v. *Sunburst Oil and Refinery,* 287 U. S. 358, 366-67 (1932); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, 320 (1930); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673 (1930).

Should it be considered that this appeal was improvidently taken, this Court nevertheless has jurisdiction to

review the judgment of the Supreme Court of New Jersey by writ of certiorari pursuant to 28 U.S.C. section 1257(3); 28 U.S.C. section 2103. The following case sustains the jurisdiction of this Court for such review: *Pennsylvania* v. *Philadelphia,* 353 U. S. 230 (1957).

Constitutional Provisions and Statute Involved

U. S. Constitution, article IV, section 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U. S. Constitution, fourteenth amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N. J. Constitution, article 1, section 1:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N. J. Constitution, article III, section 1:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

N. J. Constitution, article IV, section 6, paragraph 2:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

N.J.S.A. 40:55-30:

> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State.
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> The authority conferred by this Article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other

structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes.

Questions Presented

1. Does the decision of the New Jersey Supreme Court violate the doctrine of separation of powers thereby denying the citizens of Mount Laurel the republican form of government guaranteed by article IV, section 4 of the United States Constitution?

2. Does the decision of the New Jersey Supreme Court deny Mount Laurel equal protection of the laws under the fourteenth amendment of the United States Constitution?

Statement of the Case

Mount Laurel Township consists of approximately 22 square miles, or about 14,000 acres. Of that acreage, 65 percent is vacant or in agricultural use. The township is located in the southern part of Burlington County in the State of New Jersey, just east of the Camden-Philadelphia area. The municipality is about seven miles from the nearest border of the city of Camden and is essentially rural in character. In 1970, its population was only 11,221, less than one person per acre.

The only means of transportation to and from the municipality is by truck or automobile. A state highway, route 38, runs through the northeasterly section. The New Jersey Turnpike and Route I-295 run west of the

municipality with the Camden-Philadelphia interchange at the corner of the municipality nearest Camden. State Highway 73 runs at right angles to the turnpike and the interchange.

Mount Laurel has enacted a comprehensive zoning ordinance pursuant to the zoning power delegated to it by the New Jersey legislature. N.J.S.A. 40:55-30 *et seq.* 29.2 per cent of the land in the township is zoned for industry; 100 acres of the land was occupied by industrial uses at the time of trial. Agriculture, farm dwellings, motels, a harness racetrack and certain retail and service establishments are also permitted in this zone. 1.2 per cent of the land is zoned for retail business use, some of it near the turnpike interchange and the rest allocated mostly to a handful of neighborhood commercial districts. There is no major shopping center or concentrated retail commercial area in the township.

The remaining land area, approximately 10,000 acres, is zoned for residential use. Four residential zones are designated, R-1, R-1D, R-2 and R-3. The minimum lot sizes and minimum floor area requirements in these zones are as follows:

	Minimum lot size[1] (in square feet)		Minimum floor area per dwelling (in square feet)	
	Interior	*Corner*	*One Story*	*1½ stories or more*
R-1	9,375	11,000	1,100	1,300
R-1D	10,000	12,000	1,100	1,300 (gross density 2.25 units per acre)
R-2	11,000	11,000	900	1,300
R-3	20,000	20,000	1,100	1,300

[1] One-fourth of an acre contains 10,890 square feet.

Variation from the conventional one family dwelling development is present in Mount Laurel by use of planned unit developments.[2] Mount Laurel has four such projects which are very substantial, involving the erection of at least 10,000 sale and rental housing units of various types, including multi-family housing in the form of rental garden, medium rise and high rise apartments and attached townhouses. If completed as planned, these four projects will in themselves ultimately quadruple the township's 1970 population.

Although the zoning ordinance permits a variety of residential uses, the Supreme Court of New Jersey nonetheless held the ordinance deficient. In reaching that result, the court found that zoning techniques utilized by municipalities statewide contribute to a shortage of low and moderate income housing in the state. It held, however, that because Mount Laurel belongs to a class of municipalities defined as "developing"[3] it must "by its land use regulations, presumptively make realistically possible an

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[2] In a planned unit development, the type, density and placement of houses and buildings is determined by agreement between the developer and the municipal authority under broad guidelines laid down by State enabling legislation and an implementing local ordinance. Emphasis is on a permitted mixture of dwellings, including various kinds of living accommodations, with or without commercial and industrial enterprises. New Jersey passed such enabling legislation in 1967. N.J.S.A. 40:55-54 *et seq.*

[3] The municipalities in the class defined by the court to bear the burden of providing low and moderate income housing are characterized by the court as having sizable land area, few rural attributes, significant past and present population increase, incomplete development and inevitable future residential, commercial and industrial demand and growth. 67 N. J. at 160, 336 A. 2d at 717.

appropriate variety and choice of housing" so that the opportunity for low and moderate income housing is affirmatively afforded "at least to the extent of the municipality's fair share of the present and prospective regional need therefor." 67 N. J. at 174, 336 A. 2d at 724. That is, "[i]t must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like. . . ." 67 N. J. at 187, 336 A. 2d at 732. The court granted Mount Laurel 90 days to amend its zoning ordinance to comply with the requisites of its decision.

In so holding, the New Jersey Supreme Court made a legislative type determination that a class of New Jersey municipalities, which includes Mount Laurel, is to bear the burden of rezoning to rectify the housing problems which the court found resulted from zoning practices of municipalities throughout the state. That court has no constitutional power to create such legislation. Rather, such power is reserved to the state legislature. Thus, the New Jersey Supreme Court usurped the function of the New Jersey legislature, depriving the citizens of Mount Laurel of government through their elected representatives. Furthermore, the New Jersey Supreme Court created a legislative classification which in itself is an invidious discrimination aganst Mount Laurel.

The decision of March 24, 1975 of the New Jersey Supreme Court itself creates the federal constitutional questions presented to this Court. It is not reasonable to expect that the judiciary would exceed its constitutional powers by engaging in legislative type determinations, much less make legislative type classifications which in themselves constitute invidious discrimination against the

litigant before it, such as has occurred in this case. Therefore, the federal constitutional questions now being raised before this Court could not have been reasonably anticipated in the course of the litigation before the courts of New Jersey.

On June 16, 1975, appellant moved before the New Jersey Supreme Court for leave to file a Petition for Rehearing out of time, accompanying the motion with its Petition for Rehearing in which it urged the court to reconsider its decision on the federal constitutional grounds now presented to this Court. The court granted the motion and, by order entered June 26, 1975, denied the Petition for Rehearing.

The Questions Presented Are Substantial

I.

The decision of the New Jersey Supreme Court violates the New Jersey constitutional mandate of separation of powers thereby denying the citizens of Mount Laurel the republican form of government guaranteed by article IV, sec. 4 of the United States Constitution.

In its unprecedented decision, the New Jersey Supreme Court has ruled that a developing municipality, without powers beyond its boundaries, must affirmatively act to fulfill the need for low and moderate income housing in the region in which it is located. The court held that Mount Laurel must amend its zoning ordinance to permit high density zoning, including multi-family housing without bedroom or similar restrictions and small dwellings on very small lots without "unjustifiable" minimum requirements as to lot and building size, and the like. In so

mandating the manner in which regional needs for low and moderate income housing should be fulfilled in New Jersey, the Supreme Court decided a political question, thereby violating the state constitutional command of separation of powers[4] and the federal constitutional mandate[5] that state governments be republican in form.[6]

The test to be applied in determining whether or not a political question is presented was established by this Court in *Baker* v. *Carr,* 369 U. S. 186 (1962). It was there determined that a political question suffers from one or more of the following infirmities:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . a lack of judicially discoverable and

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[4] Article III, section 1 of the New Jersey Constitution provides:

1. Branches of government

1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

[5] Article IV, section 4 of the U. S. Constitution provides in part:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[6] "Republican" is defined in the 1786 edition of Samuel Johnson's Dictionary as "Placing the government in the people."

> manageable standards for resolving it; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; . . . an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

This Court has consistently held that the presence of one or more of these infirmities in cases presenting claims under the guarantee clause renders them nonjusticiable. *Id.* at 218. However, only "some" cases brought under the guarantee clause define a political question. *Reynolds* v. *Sims,* 377 U. S. 532, 582 (1968). Therefore where no political question is presented, the fact that the guarantee clause is involved does not render the case nonjusticiable.[7]

Mount Laurel does not complain that the government of New Jersey as presently constituted is not republican in structure. Rather it complains only of a single action of the state judiciary, to wit, the mandating of the manner in which regional housing needs for low and moderate income persons must be solved. That action was

[7] The fact that Mount Laurel is seeking vindication of political rights does not render this controversy nonjusticiable. *Baker* v. *Carr,* 369 U. S. at 209-10; *Nixon* v. *Herndon,* 273 U. S. 536 (1927). As stated in *Baker* v. *Carr,* 369 U. S. at 218: "[T]he nonjusticiability of [guarantee clause claims] has nothing to do with their touching upon matters of state governmental organization."

taken without the consent of the state's citizens and is contrary to the scope of the New Jersey Supreme Court's lawful authority. To the extent that court's decision is permitted to stand, it will work a denial of a republican form of government.

The correction of this unconstitutional act does not require massive judicial intervention or the complete disruption and dissolution of the state government. Neither is this Court faced with a question to be decided by a political branch of government co-equal with this Court or policy determinations for which judicially manageable standards are lacking. This case instead involves only a single action taken by the state judiciary which, as will hereafter be shown, unconstitutionally intruded upon power properly allocated to the state legislature. The correction of this wrong is within the sphere of the authority of this Court consistent with the constitutional mandate that the United States guarantee a republican form of government. U. S. Const. article IV, section 4.[8]

In contrast to the issue here presented, the action taken by the New Jersey Supreme Court involved the resolu-

[8] The guarantee clause is not included in articles I, II or III of the Constitution which prescribe the respective functions of each branch of government. Rather it is located in a separate article, implying that the judiciary is as fully empowered to enforce the clause, as is the Congress. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude,* 46 MINN. L. REV. 513, 523 (1962). Furthermore, the structure of the clause itself presumes judicial enforcement of the guarantee. While the latter part of the clause is restricted with respect to domestic violence to legislative or executive interference, it is significant to note that no such restriction is applicable to the first part. Instead, the responsibility for the enforcement of the clause is broadly placed on the United States, in the government of which the judiciary is a separate but equal part.

tion of a political question. This is demonstrated by a comparison of the decision below with the list of infirmities stated by this Court to inhere in political questions. The most obvious of these infirmities is the impossibility of deciding how low and moderate income housing should be provided without an initial policy determination of a kind clearly for nonjudicial discretion. The fulfillment of the statewide need for low and moderate income housing may be accomplished by a variety of means, either with or without alteration of an existing zoning pattern. The zoning restrictions labeled by the New Jersey Supreme Court as "exclusionary" do not in themselves deny adequate housing. Rather, high building costs make the construction of low and moderate income housing financially prohibitive under current zoning patterns.

Because the problem stems from cost, it can be resolved in many ways other than by the state supreme court's lowering the standards set by municipal zoning legislation. For example, the legislature might decide to impose on industry the burden of subsidizing housing construction in the vicinity of any present or future sites as a condition to doing business in the state; or the legislature might create a negative income tax to insure low and moderate income families sufficient means to obtain housing in relatively low density areas; or the legislature might subsidize housing altogether or it might impose an income tax and repeal property taxes, thereby removing municipal incentive to zone for tax ratables. The legislature might do any one or a combination of the above as well as control the use of certain zoning restrictions in those instances where the legislature has determined that they unduly impede the provision of acceptable housing for families of low and moderate income. In fact, with respect to mobile homes, the legislature has already taken such action by invalidating any

building, plumbing, heating or electrical code standards established by the State's political subdivisions which are more stringent than standards established by the State Department of Community Affairs, a department of the State Executive. L. 1952, c. 148, N.J.S.A. 52:27D-25.6.

The New Jersey legislature has also passed a plethora of legislation to deal with the problem of providing low and moderate cost housing. It has passed the "Local Housing Authorities Law," L. 1938, c. 19, N.J.S.A. 55:14A-1 *et seq.*, which provides for the creation of municipal, county and regional housing authorities for the purpose of acquiring, leasing and operating housing projects for low income persons, including providing for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof. L. 1938, c. 19, L. 1950, c. 326, N.J.S.A. 55:14A-7. The State legislature has provided that such housing projects are subject to local planning, zoning, sanitary and building laws, ordinances and regulations. L. 1938, c. 19, N.J.S.A. 55:14A-11. Thus, the New Jersey legislature has made a policy determination that the building of housing for persons of limited income should be subject to the local zoning ordinances of the municipalities in which they are located.[9]

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[9] This policy determination comports with the clear delegation of the zoning power to municipalities in New Jersey. This Court has recognized that the police power of the state is ample to permit zoning for "[a] quiet place where yards are wide, people few, and motor vehicles restricted" and "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9 (1974). Mount Laurel's zoning ordinance fulfills those legitimate purposes. Furthermore, the provision for numerous apartments in Mount Laurel affords the opportunity for persons in various types of dwellings to enjoy these benefits.

Furthermore, the legislature has created several agencies to help finance the construction and utilization of low cost housing. New Jersey Housing Finance Agency Law of 1967, L. 1967, c. 81, N.J.S.A. 55:14J-1 *et seq.*, Mortgage Finance Agency Law, L. 1970, c. 38, N.J.S.A. 17:1B-1 *et seq.;* Department of Community Affairs Demonstration Grant Law, L. 1967, c. 82, N.J.S.A. 52:27D-59 *et seq.* (permits commissioner of department to make non-interest bearing advance to non-profit and mutual housing sponsors to defray development costs for moderate income housing); Housing Co-operation Law, L. 1958, c. 163, N.J.S.A. 55:14B-4 *et seq.* (authorizes municipalities to issue bonds for the purpose of aiding any federally assisted housing project); Redevelopment Companies Law, L. 1944, c. 169, N.J.S.A. 55:14D-1 *et seq.* (creates redevelopment companies authorized to borrow funds to finance reconstruction and rehabilitation of and for housing projects—prohibits escalation of property taxes from time when project proposed); State Housing Law, L. 1949, c. 303, N.J.S.A. 55:14H-1 *et seq.* (State Housing Council can make financing agreements with builders, housing corporations, redevelopment companies, cooperatives, municipalities, local housing authorities, the Federal government, any State department or subdivision thereof to provide dwellings in the State for people in need of them); Limited Dividend Housing Corporations or Associations Law, L. 1949, c. 184, as amended L. 1967, c. 112, N.J.S.A. 55:16-1 *et seq.* (housing projects exempt from taxation—housing corporation itself exempt from State franchise taxes). Projects under the local housing authority law are also exempt from taxation. L. 1938, c. 19, N.J.S.A. 55:14A-20.[10] The many approaches already

[10] The New Jersey legislature is continuing to seek means to deal with housing needs in New Jersey. For example, Senate Bill No. 3100, introduced March 24, 1975, would empower the Department of Community Affairs to ascertain state housing needs and apportion shares to counties which in turn apportion shares to municipalities within the county.

utilized by the State legislature indicate the variety of means available to meet the state's housing needs without creating new densely populated areas which are themselves undesirable places to live. Therefore, it is clear that the means of providing low and moderate income housing involves an initial policy decision of a kind for nonjudicial discretion.

The second infirmity rendering the question before the New Jersey Supreme Court political in nature is the lack of judicially discoverable and manageable standards for determining how low and moderate income housing should be provided. The formulation of plans to fulfill New Jersey's low and moderate income housing needs requires extensive statewide fact-finding investigation and research, including such factors as cost analyses, determination of prospective population shifts and changing birth rates, analyses of the course of future industrial growth, the need for environmental protection and preservation, resource utilization, transportation facilities, etc. The need for extensive statewide planning for housing in light of these variables has been recognized by the State legislature. L. 1961, c. 47, N.J.S.A. 13:1B-5.1. The judiciary clearly does not have the resources to perform such investigation. Because the judiciary lacks these resources, it also is unable to analyze and synthesize properly the relevant data to formulate the appropriate courses of action to resolve the problem.

Another reason why the question before the New Jersey Supreme Court is political in nature is that the issue of how low and moderate income housing is to be provided in New Jersey has been constitutionally committed to the legislature. *Southern Burlington County N.A.A.C.P.* v. *Township of Mount Laurel,* 67 N. J. 151, 174 (1975). The state constitution expressly authorizes the legislature to

delegate the zoning power to municipalities. N. J. Constitution, article IV, section 6, paragraph 2. That delegation has been made. L. 1948, c. 305, N.J.S.A. 40:55-30 *et seq.* The fulfillment of housing needs, in which zoning plays a part, is clearly committed to legislative discretion. As stated in *Jamouneau* v. *Harner,* 16 N. J. 500, 515, *cert. denied,* 349 U. S. 904 (1955):

> The existence of an urgent public need due to housing scarcity is in its very nature for the determination of the legislative authority. . . . [T]he Legislature has a broad discretion in assessing the need and the means requisite for the protection of the common weal; and fairly debatable questions of policy and procedure are resolved in favor of the power. [citations omitted]

Thus, the power to formulate governmental policy for the manner in which low and moderate income housing is to be provided is reserved for the exercise of legislative discretion.

Finally, because the issue of how low and moderate income housing is to be provided in New Jersey is fraught with all of the infirmities inherent in a political question, the independent determination by the New Jersey Supreme Court of what steps are necessary to provide for that housing usurps the constitutional function of the legislature and demonstrates a lack of respect due that coordinate branch of government. No construction of state statutory or constitutional law can justify judicial legislation. *Studerus Oil Co.* v. *Jersey City,* 128 N. J. L. 286, 25 A. 2d 502 (Sup. Ct. 1942).

By deciding this political question the state court violated the state constitutional mandate of separation

of powers.[11] This violation denies the citizens of Mount Laurel government by consent through their elected representatives, thereby depriving them of the republican form of government guaranteed by article IV, section 4 of the United States Constitution. Central to the concept of a republican form of government is a delegation of the lawmaking power to an adequate number of representatives, with an unimpeded reversion back to the people at short periods through election. 3 ELLIOT'S DEBATES 396 (1891) (Patrick Henry). Thomas Jefferson concluded that government continued to be republican only to the extent that the representatives chosen by popular election continued to be subject to the will of their masters, the people, through elections held at sufficiently brief intervals. 11 FORD, THE WORKS OF THOMAS JEFFERSON 529-33 (1905).

The judiciary of New Jersey is not an elected body and has no affirmative law making powers. Rather, its role is restricted to interpreting the legislative judgment or the mandate of the people as embodied in the constitution. These powers are exercised by consent of the people only when the judiciary exercises them within the bounds prescribed by the state constitution. When it exceeds those bounds and exercises the affirmative lawmaking powers reserved for exercise by its coordinate political department, the legislature, it no longer acts by consent of the

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[11] This Court expressly recognized this proposition in *Baker* v. *Carr,* 369 U. S. 186, 210 (1962) where it stated: "The nonjusticiability of a political question is primarily a function of the separation of powers."

people, but in defiance.[12] It is incumbent upon this Court to nullify this unauthorized judicial action and return to the citizens of Mount Laurel their constitutional right to republican government.

II.

The decision of the New Jersey Supreme Court denies Mount Laurel equal protection of the laws under the Fourteenth Amendment.

The New Jersey Supreme Court's decision of March 24, 1975, works an invidious discrimination against the Township of Mount Laurel and other similar townships in New Jersey in violation of the equal protection guarantee of the fourteenth amendment to the United States Constitution.[13] Mount Laurel is protected against such action by the New Jersey Supreme Court because, like a private corporation, it is a "person" within the meaning of the

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[12] Although there has been no alteration by the state judiciary of the structure of the state government, it is clear that no such alteration is necessary before a violation of the constitutional right to republican government occurs. Republican "form" of government refers to the substance rather than the structure of that government. Bonfield, *Guarantee Clause of Article IV, Section 4: A Study of Constitutional Desuetude*, 46 MINN. L. REV. 513, 530 (1962). Therefore, this federal constitutional right has been violated by the state court's usurpation of the legislative function although the state legislature was not abolished *per se*.

[13] It is established that a violation of fourteenth amendment rights may be accomplished by the actions of a state judiciary in the course of construing otherwise valid state law. *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673 (1930); *Ownbey* v. *Morgan*, 256 U. S. 94 (1921).

fourteenth amendment.[14] *Township of River Vale* v. *Town of Orangetown*, 403 F. 2d 684 (2nd Cir. 1968).

The equal protection clause of the fourteenth amendment denies states the power to legislate that different treatment be accorded persons placed into different classes on the basis of criteria wholly unrelated to the objective of the legislation. A classification must be reasonable, not arbitrary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Reed* v. *Reed*, 404 U. S. 71, 72 (1971); *Eisenstadt* v. *Baird*, 405 U. S. 438, 447-48 (1972).

The class which the New Jersey Supreme Court has defined constitutes an invidious discrimination against Mount Laurel and other developing municipalities. That court characterized the municipalities in the class as having sizeable land area, few rural attributes, significant past or present population increase, incomplete development and inevitable future residential, commercial and

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[14] In this appeal, Mount Laurel complains of the action of the New Jersey Supreme Court in its decision of March 24, 1975 and not the action of its creator, the legislature of New Jersey. L. 1872, c. 153. In the cases holding a municipality unable to invoke the equal protection clause against its creator, the "creator" has always been synonymous with the legislature or an administrative body created by the legislature to carry out its functions. *E.g. Williams* v. *Baltimore*, 289 U. S. 36 (1933); *Trenton* v. *New Jersey*, 262 U. S. 182 (1923); *Hunter* v. *Pittsburgh*, 207 U. S. 161 (1907); *Clifton* v. *Passaic County Board of Taxation*, 28 N. J. 411, 147 A. 2d 1 (1958); *North Jersey District Water Supply Comm'n* v. *State Water Policy Commission*, 129 N. J. L. 326, 29 A. 2d 617 (Sup. Ct. 1943); *City of Boston* v. *Mass. Port Authority*, 320 F. Supp. 1317 (D. Mass.), *aff'd*, 444 F. 2d 167 (1st Cir. 1971). No case has ever held that a municipality lacks fourteenth amendment rights against unauthorized lawmaking by the judiciary.

industrial demand and growth. 67 N. J. at 160, 336 A. 2d at 717. These differentiating characteristics bear no reasonable relationship, however, to the evil which the court purports to eradicate, *i.e.,* the lack of adequate low and moderate income housing in the State of New Jersey. The classification is arbitrary and unreasonable because it excludes municipalities which also utilize the zoning techniques condemned by the court, is based on municipal land area which bears no relationship to low and moderate income housing needs or the ability of the municipality to meet the attendant fiscal demands and requires only a "developing" municipality to fulfill regional housing demands when it has no power to tax the region.

The New Jersey Supreme Court found that exclusionary zoning techniques which deter construction of housing of all types and varieties are practiced by municipalities statewide. 67 N. J. at 206-19, fns. 12-18, 336 A. 2d at 729-30, fns. 12-19. *A fortiori,* the evil would exist in the land use regulations of almost any New Jersey municipality; yet, the court arbitrarily selected municipalities such as Mount Laurel to bear the burden of zoning for low and moderate income housing. A conclusion that restrictive zoning techniques are utilized only by developing municipalities as a class, which is necessary to justify placing the burden on the class, is not supported by the evidence. In the factual studies relied upon the court, zoning data is not presented by municipality but is instead aggregated solely on a countywide basis. *See* New Jersey Department of Community Affairs, Division of State and Regional Planning, *Land Use Regulation, The Residential Land Supply* (1972); Williams and Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey,* 22 SYRACUSE L. REV. 475 (1971); Cahill, *A Blueprint for Housing in New Jersey* (1970).

The classification created by the New Jersey Supreme Court is also arbitrary and unreasonable because it excludes municipalities which have available vacant land on the grounds that such municipalities are small. This is amply demonstrated by three lower court decisions which immediately followed the Supreme Court's decision. *Segal Construction Company* v. *Zoning Board of Adjustment, Borough of Wenonah, New Jersey and Mayor and Borough Council of Wenonah,* A-797-73, —— N. J. Super. —— (App. Div. 1975); *Wilann Associates* v. *Borough of Rockleigh,* L-3224-72, —— N. J. Super. —— (App. Div. 1975); *Pascack Association Limited* v. *The Mayor and Council of the Township of Washington,* 1841-73, —— N. J. Super. —— (App. Div. 1975). The available vacant land in each of the three towns constitutes 16.5 percent (109 acres), 7.5 percent (45 acres) and 3 percent (106 acres) of their respective total land areas. Yet these municipalities are wholly exempt from the burden of providing for regional low and moderate income housing needs.

In contrast, another municipality, with a population of 7,500 persons and an area of 17.9 square miles, has been ordered to increase its population *two-fold* by zoning to provide not less than 2,100 units of low and moderate income housing when its existing residential units total only 1,848.[15] *Middle Union Associates* v. *Zoning*

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[15] The projected increase of this municipality's population is based on an average family size of 3.3 members in all families in the annual income range of less than $1,000 to $14,999. This is a conservative projection considering that moderate income families ($15,000 to $24,999) have an average of 3.86 members, which would more than double the present population. U. S. Bureau of the Census, *Census of Population*: 1970, Vol. I, "Characteristics of the Population," Part I, United States Summary—Section 2.

Board of Adjustment of Township of Holmdel, et al., L-1149-72 P.W., —— N. J. Super. —— (Law Div. 1975). Also by contrast, Mount Laurel with total land area of 22 square miles and a population of 11,221 has been ordered to rezone to provide for low and moderate income regional housing needs.

No evidence supports the conclusion that the need for low and moderate income housing bears a direct relationship to the amount of the land area in a municipality. Nor does the size of the land area in a municipality necessarily correlate with a municipality's ability to provide for low and moderate income housing. A municipality may be small, wealthy[16] and yet have undeveloped land.[17] That Mount Laurel has 14,000 acres of total land area does not make it more able than developed municipalities to raise the tax revenues to meet regional housing needs. Certainly, a fair share of regional housing needs could reasonably be based upon a municipality's

[16] For example, Essex Fells, a New Jersey municipality consisting of 1.3 square miles, is the wealthiest community in New Jersey. The annual mean family income is $33,063. 5.9 percent (49 acres) of the land is available for development. This municipality clearly would not qualify as "developing" as defined by the New Jersey Supreme Court. *U. S. Census Data for New Jersey Townships* (Dept. of Community Affairs, 1970); *Financial Statistics of New Jersey Local Government* (N. J. Taxpayers Assoc., 1972); James & Hughes, *Modeling State Growth: New Jersey 1980* (Rutgers, 1973).

[17] The municipality of Englewood Cliffs, the 9th wealthiest community in New Jersey, having an annual mean family income of $25,029, also would not qualify as a developing municipality. While Englewood Cliffs is a small municipality having a total land area of 1.8 square miles, 42.18 percent (486 acres) of this area is available for development. *U. S. Census Data for New Jersey Townships* (Dept. of Community Affairs, 1970); *Financial Statistics of New Jersey Local Government* (N. J. Taxpayers Assoc., 1972); James & Hughes, *Modeling State Growth: New Jersey 1980* (Rutgers, 1973).

ability to provide for such needs. The New Jersey Supreme Court's classification fails to make such a rational and equitable distribution of the burden.

The most glaring reason why the classification is arbitrary and unreasonable is that it imposes the exceptional burden only on Mount Laurel and other developing municipalities to provide for regional housing needs when such a municipality has no power to tax throughout the region. As acknowledged by the New Jersey Supreme Court, low and moderate income housing *cannot* be built without some form of governmental subsidy. 67 N. J. at 170, fn. 8, 336 A. 2d at 722, fn. 8. Thus, typically such housing will be exempt from taxation or subject to limited taxation, casting the onus on the municipality to generate sufficient tax revenues to construct and maintain municipal services for such housing. In *Middle Union Associates, supra,* for example, half of the affected town's populace will be faced with the unenviable task of bearing the cost of municipal services for themselves and the other half of the town's population.

Under the present state tax structure,[18] there is no way that the fiscal burden of the vastly expanded municipal services which these new units will require, such as sewerage, water, police and fire protection and schools, can be apportioned throughout the region whose needs are served by the municipality. Taxpayers of developing municipalities will not be reimbursed for the vast financial outlay which will be required for municipal services upon the construction of such housing, even if governmental aid is forthcoming to subsidize municipal services at some later date. Only developing municipalities will have to

[18] New Jersey's tax structure has imposed on local real estate most of the cost of municipal and county government and the primary and secondary education of the municipality's children. 67 N. J. at 171, 336 A. 2d at 723.

absorb the tremendous financial costs of low and moderate income housing for the region.

This is not a problem which can be brushed aside cavalierly with the notion that perhaps assistance for developing municipalities will be furnished in the future by some governmental entity. 67 N. J. at 188, fn. 21, 336 A. 2d at 732, fn. 21. The New Jersey Supreme Court has established one formula for provision of low and moderate income housing. The court mandated that developing municipalities affirmatively provide an opportunity for such housing. Furthermore, it asserted that there is a moral obligation in a municipality to establish a local housing agency pursuant to state law. 67 N. J. at 192, 336 A. 2d at 734. The court acknowledged however that low and moderate income housing cannot be constructed without governmental subsidy. 67 N. J. at 170, fn. 8, 336 A. 2d at 722, fn. 8. Thus, the court's formula is tantamount to compulsion of immediate legislative provision for low and moderate income housing by developing municipalities. Therefore, the fiscal dilemmas raised by this decision must be addressed now before such housing is constructed at the expense of these municipalities.

In the final analysis, then, by this decision, developing municipalities alone are to be penalized for the statewide use of zoning techniques denominated as exclusionary by the New Jersey Supreme Court. They alone will bear the burden of conforming to that court's legislative-type mandate. Small towns and developed municipalities,[19] including many of New Jersey's wealthiest communities, will not have this burden placed on them and, of course, under the existing tax structure, will not be required to pay any of the costs of satisfying low and moderate income housing needs. The arbitrary imposition of such a burden only on developing municipalities such as Mount Laurel is a clear violation of the equal protection clause of the fourteenth amendment.

[19] Millburn Township is the second wealthiest community in New Jersey with a mean family income of $31,109 annually. The land available for development in this community represents only 7.1 per cent of its total land area. Clearly this municipality would not qualify as a "developing community." *U. S. Census Data for New Jersey Townships* (Dept. of Community Affairs, 1970); *Financial Statistics of New Jersey Local Government* (N. J. Taxpayers Asso., 1972); James & Hughes, *Modeling State Growth: New Jersey 1980* (Rutgers, 1973).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of New Jersey

No. A-11 September Term 1973
67 N. J. 151 (1975)

Southern Burlington County N.A.A.C.P., Camden County C.O.R.E., Camden County N.A.A.C.P., Gladys Clark, Betty Weal and Angel Perez,

Plaintiffs-Respondents
and Cross-Appellants,

and

Ethel Lawrence, Thomasine Lawrence, Catherine Still, Mary E. Smith, Shirley Morris and Jacqueline Custis,

Plaintiffs-Respondents,

v.

Township of Mount Laurel,

Defendant-Appellant
and Cross-Respondent.

Argued January 8, 1974. Decided March 24, 1975.

On Cross-Appeals by Direct Certification to the Superior Court, Law Division, Burlington County, whose opinion is reported at 119 N. J. Super. 164.

The opinion of the Court was delivered by

Hall, J. This case attacks the system of land use regulation by defendant Township of Mount Laurel on the

Appendix A

ground tha[t] low and moderate income families are thereby unlawfully excluded from the municipality. The trial court so found, 119 N. J. Super. 164 (Law Div. 1972), and declared the township zoning ordinance totally invalid. Its judgment went on, in line with the requests for affirmative relief, to order the municipality to make studies of the housing needs of low and moderate income persons presently or formerly residing in the community in substandard housing, as well as those in such income classifications presently employed in the township and living elsewhere or reasonably expected to be employed therein in the future, and to present a plan of affirmative public action designed "to enable and encourage the satisfaction of the indicated needs." Jurisdiction was retained for judicial consideration and approval of such a plan and for the entry of a final order requiring its implementation.

The township appealed to the Appellate Division and those plaintiffs, not present or former residents, cross-appealed on the basis that the judgment should have directed that the prescribed plan take into account as well a fair share of the regional housing needs of low and moderate income families without limitation to those having past, present or prospective connection with the township. The appeals were certified on our own motion before argument in the Division. R. 2:12-1.[1]

The implications of the issue presented are indeed broad and far-reaching, extending much beyond these par-

[1] The judgment stayed the declaration of invalidity of the zoning ordinance until the court should decide "that sufficient time has elapsed to enable the municipality to enact new and proper regulations." The other provisions of the judgment were stayed pending appeal by subsequent order of the trial court.

Appendix A

ticular plaintiffs and the boundaries of this particular municipality.

There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families.[2] The situation was characterized as a "crisis" and fully explored and documented by Governor Cahill in two special messages to the Legislature—*A Blueprint for Housing in New Jersey* (1970) and *New Horizons in Housing* (1972).

[1] Plaintiffs represent the minority group poor (black and Hispanic)[3] seeking such quarters. But they are not

[2] "Low income" was used in this case to refer to those persons or families eligible, by virtue of limited income, for occupancy in public housing units or units receiving rent supplement subsidies according to formulas therefor in effect in the area. "Moderate income" was similarly used to refer to those eligible for occupancy in housing units receiving so-called Section 235 or 236 or like subsidies. In another case, *Oakwood at Madison* v. *Township of Madison*, 128 N. J. Super. 438, 445 (Law Div. 1974), the figures of income up to $7,000 a year for the first category and up to $10,000-$12,000 for the second were projected. While the formula figures vary depending on family size, the dollar amounts mentioned are close enough to represent the top income in each classification for present purposes. "Middle income" and "upper income" are the designations of higher income categories.

[3] Plaintiffs fall into four categories: (1) present residents of the township residing in dilapidated or substandard housing; (2) former residents who were forced to move elsewhere because of the absence of suitable housing; (3) nonresidents living in central city substandard housing in the region who desire to secure de-

(Footnote continued on following page)

the only category of persons barred from so many municipalities by reason of restrictive land use regulations. We have reference to young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments. We will, therefore, consider the case from the wider viewpoint that the effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources. In this connection, we accept the representation of the municipality's counsel at oral argument that the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal basis of race, origin or believed social incompatibility.

As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to

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(Footnote continued from preceding page)

cent housing and accompanying advantages within their means elsewhere; (4) three organizations representing the housing and other interests of racial minorities. The township originally challenged plaintiffs' standing to bring this action. The trial court properly held (119 N. J. Super. at 166) that the resident plaintiffs had adequate standing to ground the entire action and found it unnecessary to pass on that of the other plaintiffs. The issue has not been raised on appeal. We merely add that both categories of nonresident individuals likewise have standing. N.J.S.A. 40:55-47.1; *cf. Walker* v. *Borough of Stanhope,* 23 N. J. 657 (1957). No opinion is expressed as to the standing of the organizations.

any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised.

Extensive oral and documentary evidence was introduced at the trial, largely informational, dealing with the development of Mount Laurel, including the nature and effect of municipal regulation, the details of the region of which it is a part and the recent history thereof, and some of the basics of housing, special reference being directed to that for low and moderate income families. The record has been supplemented by figures, maps, studies and literature furnished or referred to by counsel and the *amici,* so that the court has a clear picture of land use regulation and its effects in the developing municipalities of the state.

This evidence was not contradicted by the township, except in a few unimportant details. Its candid position is

that, conceding its land use regulation was intended to result and has resulted in economic discrimination and exclusion of substantial segments of the area population, its policies and practices are in the best present and future fiscal interest of the municipality and its inhabitants and are legally permissible and justified. It further asserts that the trial court was without power to direct the affirmative relief it did.

I

The Facts

Mount Laurel is a flat, sprawling township, 22 square miles, or about 14,000 acres, in area, on the west central edge of Burlington County. It is roughly triangular in shape, with its base, approximately eight miles long, extending in a northeasterly-southwesterly direction roughly parallel with and a few miles east of the Delaware River. Part of its southerly side abuts Cherry Hill in Camden County. That section of the township is about seven miles from the boundary line of the city of Camden and not more than 10 miles from the Benjamin Franklin Bridge crossing the river to Philadelphia.

In 1950, the township had a population of 2817, only about 600 more people than it had in 1940. It was then, as it had been for decades, primarily a rural agricultural area with no sizeable settlements or commercial or industrial enterprises. The populace generally lived in individual houses scattered along country roads. There were several pockets of poverty, with deteriorating or dilapidated housing (apparently 300 or so units of which remain today in equally poor condition). After 1950, as in so

many other municipalities similarly situated, residential development and some commerce and industry began to come in. By 1960 the population had almost doubled to 5249 and by 1970 had more than doubled again to 11,221. These new residents were, of course, "outsiders" from the nearby central cities and older suburbs or from more distant places drawn here by reason of employment in the region. The township is now definitely a part of the outer ring of the South Jersey metropolitan area, which area we define as those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden city. And 65% of the township is still vacant land or in agricultural use.

The growth of the township has been spurred by the construction or improvement of main highways through or near it. The New Jersey Turnpike, and now route I-295, a freeway paralleling the turnpike, traverse the municipality near its base, with the main Camden-Philadelphia turnpike interchange at the corner nearest Camden. State route 73 runs at right angles to the turnpike at the interchange and route 38 slices through the northeasterly section. Routes 70 and U. S. 130 are not far away. This highway network gives the township a most strategic location from the standpoint of transport of goods and people by truck and private car. There is no other means of transportation.

The location and nature of development has been, as usual, controlled by the local zoning enactments. The general ordinance presently in force, which was declared invalid by the trial court, was adopted in 1964. We understand that earlier enactments provided, however, basically the same scheme but were less restrictive as to residential

development. The growth pattern dictated by the ordinance is typical.

Under the present ordinance, 29.2% of all the land in the township, or 4.121 acres, is zoned for industry. This amounts to 2,800 more acres than were so zoned by the 1954 ordinance. The industrial districts comprise most of the land on both sides of the turnpike and routes I-295, 73 and 38. Only industry meeting specified performance standards is permitted. The effect is to limit the use substantially to light manufacturing, research, distribution of goods, offices and the like. Some non-industrial uses, such as agriculture, farm dwellings, motels, a harness racetrack, and certain retail sales and service establishments, are permitted in this zone. At the time of trial no more than 100 acres, mostly in the southwesterly corner along route 73 adjacent to the turnpike and I-295 interchanges, were actually occupied by industrial uses. They had been constructed in recent years, mostly in several industrial parks, and involved tax ratables of about 16 million dollars. The rest of the land so zoned has remained undeveloped. If it were fully utilized, the testimony was that about 43,500 industrial jobs would be created, but it appeared clear that, as happens in the case of so many municipalities, much more land has been so zoned than the reasonable potential for industrial movement or expansion warrants. At the same time, however, the land cannot be used for residential development under the general ordinance.

The amount of land zoned for retail business use under the general ordinance is relatively small—169 acres, or 1.2% of the total. Some of it is near the turnpike interchange; most of the rest is allocated to a handful of neighborhood commercial districts. While the greater part of

the land so zoned appears to be in use, there is no major shopping center or concentrated retail commercial area—"downtown"—in the township.

The balance of the land area, almost 10,000 acres, has been developed until recently in the conventional form of major subdivisions. The general ordinance provides for four residential zones, designated R-1, R-1D, R-2 and R-3. All permit only single-family, detached dwellings, one house per lot—the usual form of grid development. Attached townhouses, apartments (except on farms for agricultural workers) and mobile homes are not allowed anywhere in the township under the general ordinance. This dwelling development, resulting in the previously mentioned quadrupling of the population, has been largely confined to the R-1 and R-2 districts in two sections—the northeasterly and southwesterly corners adjacent to the turnpike and other major highways. The result has been quite intensive development of these sections, but at a low density. The dwellings are substantial; the average value in 1971 was $32,500 and is undoubtedly much higher today.

The general ordinance requirements, while not as restrictive as those in many similar municipalities, nonetheless realistically allow only homes within the financial reach of persons of at least middle income. The R-1 zone requires a minimum lot area of 9,375 square feet, minimum lot width of 75 feet at the building line, and a minimum dwelling floor area of 1,100 square feet if a one-story building and 1,300 square feet if one and one-half stories or higher. Originally this zone comprised about 2,500 acres. Most of the subdivisions have been constructed within it so that only a few hundred acres remain (the testimony was at variance as to the exact amount). The R-2 zone, comprising a single district of

141 acres in the northeasterly corner, has been completely developed. While it only required a minimum floor area of 900 square feet for a one-story dwelling, the minimum lot size was 11,000 square feet; otherwise the requisites were the same as in the R-1 zone.

The general ordinance places the remainder of the township, outside of the industrial and commercial zones and the R-1D district (to be mentioned shortly), in the R-3 zone. This zone comprises over 7,000 acres—slightly more than half of the total municipal area—practically all of which is located in the central part of the township extending southeasterly to the apex of the triangle. The testimony was that about 4,600 acres of it then remained available for housing development. Ordinance requirements are substantially higher, however, in that the minimum lot size is increased to about one-half acre (20,000 square feet). (We understand that sewer and water utilities have not generally been installed, but, of course, they can be.) Lot width at the building line must be 100 feet. Minimum dwelling floor area is as in the R-1 zone. Presently this section is primarily in agricultural use; it contains as well most of the municipality's substandard housing.

The R-1D district was created by ordinance amendment in 1968. The area is composed of a piece of what was formerly R-3 land in the western part of that zone. The district is a so-called "cluster" zone. See generally 2 *Williams, American Planning Law: Land Use and the Police Power,* §§ 47.01-47.05 (1974). That writer defines the concept as follows:

> • • • Under the usual cluster-zoning provisions, both the size and the width of individual residential lots in a large (or medium-sized) development may be reduced, provided (usually) that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus "saved" from each individual lot is pooled and retained as common open space. The most obvious advantages include a better use of many sites, and relief from the monotony of continuous development. § 47.01, pp. 212-213.

Here this concept is implemented by reduction of the minimum lot area from 20,000 square feet required in the R-3 zone to 10,000 square feet (12,000 square feet for corner lots) but with the proviso that one-family houses—the single permitted dwelling use—"shall not be erected in excess of an allowable development density of 2.25 dwelling units per gross acre." The minimum lot width at the building line must be 80 feet and the minimum dwelling floor area is the same as in the R-3 zone. The amendment further provides that the developer must set aside and dedicate to the municipality a minimum of 15% and a maximum of 25% of the total acreage for such public uses as may be required by the Planning Board, including "but not limited to school sites, parks, playgrounds, recreation areas, public buildings, public utilities." Some dwelling development has taken place in this district, the exact extent of which is not disclosed by the record. It is apparent that the dwellings are comparable in character and value to those in the other residential zones. The testimony was that 486 acres remained available in the district.[4]

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[4] The validity of cluster zoning and of particular ordinance provisions, including, as here, those requiring the dedication of open space for public uses, has never been passed upon by this court. See generally 2 *Williams, supra,* §§ 47.02, 47.03, 47.05.

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A variation from conventional development has recently occurred in some parts of Mount Laurel, as in a number of other similar municipalities, by use of the land use regulation device known as "planned unit development" (PUD). This scheme differs from the traditional in that the type, density and placement of land uses and buildings, instead of being detailed and confined to specified districts by local legislation in advance, is determined by contract, or "deal," as to each development between the developer and the municipal administrative authority, under broad guidelines laid down by state enabling legislation and an implementing local ordinance. The stress is on regulation of density and permitted mixture of uses within the same area, including various kinds of living accommodations with or without commercial and industrial enterprises. The idea may be basically thought of as the creation of "new towns" in virgin territory, full-blown or in miniature, although most frequently the concept has been limited in practice, as in Mount Laurel, to residential developments of various sizes having some variety of housing and perhaps some retail establishments to serve the inhabitants. See generally, 2 *Williams, supra,* §§ 48.01 to 48.12; *cf. Cheney* v. *Village 2 at New Hope, Inc.,* 429 Pa. 626, 241 A. 2d 81, 82-83 (1968).

New Jersey passed such enabling legislation in 1967 (L. 1967, c. 61, amended c. 286, N.J.S.A. 40:55-54, *et seq.*), which closely follows a model act found in 114 *U. Pa. L. Rev.* 140 (1965), and Mount Laurel adopted the implementing enactment as a supplement to its general zoning ordinance in December of that year. While the ordinance was repealed early in 1971, the township governing body

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in the interim had approved four PUD projects, which were specifically saved from extinction by the repealer.[5]

These projects, three in the southwesterly sector and one in the northeasterly sector, are very substantial and involve at least 10,000 sale and rental housing units of various types to be erected over a period of years. Their bounds were created by agreement rather than legislative specification on the zoning map, invading industrial, R-1, R-1D, R-3 and even flood plain zones. If completed as planned, they will in themselves ultimately quadruple the 1970 township population, but still leave a good part of the township undeveloped. (The record does not indicate how far development in each of the projects has pro-

[5] The ordinance was held, in a taxpayer's suit, to be unconstitutional under the zoning section of the state constitution (Art. IV, sec. VI, par. 2) and violative of the general zoning enabling act (N.J.S.A. 40:55-30 *et seq.*). *Rudderow* v. *Township Committee of Mount Laurel Township,* 114 N. J. Super. 104, decided in March 1971 by the same judge who determined the instant case. His judgment was reversed by the Appellate Division in December 1972, 121 N. J. Super. 409, after the ordinance had been repealed and the instant case heard and decided at the trial level. This court has never passed upon the PUD enabling legislation, any local implementing ordinance or any municipal approval of a PUD project. The basic legal questions involved in *Rudderow,* which include among others the matter of what requirements a municipal authority may, in effect, impose upon a developer as a condition of approval, are serious and not all easy of solution. We refer to the Mount Laurel PUD projects as part of the picture of land use regulation in the township and its effect. It may be noted that, at a hearing on the PUD ordinance, the then township attorney stated that "* * * providing for apartments in a PUD ordinance in effect would seem to overcome any court objection that the Township was not properly zoning in denying apartments."

gressed.) While multi-family housing in the form of rental garden, medium rise and high rise apartments and attached townhouses is for the first time provided for, as well as single-family detached dwellings for sale, it is not designed to accommodate and is beyond the financial reach of low and moderate income families, especially those with young children. The aim is quite the contrary; as with the single-family homes in the older conventional subdivisions, only persons of medium and upper income are sought as residents.

A few details will furnish sufficient documentation. Each of the resolutions of tentative approval of the projects contains a similar fact finding to the effect that the development will attract a highly educated and trained population base to support the nearby industrial parks in the township as well as the business and commercial facilities. The approvals also sharply limit the number of apartments having more than one bedroom. Further, they require that the developer must provide in its leases that no school-age children shall be permitted to occupy any one-bedroom apartment and that no more than two such children shall reside in any two-bedroom unit. The developer is also required, prior to the issuance of the first building permit, to record a covenant, running with all land on which multi-family housing is to be constructed, providing that in the event more than .3 school children per multi-family unit shall attend the township school system in any one year, the developer will pay the cost of tuition and other school expenses of all such excess numbers of children. In addition, low density, required amenities, such as central air conditioning, and specified developer contributions help to push rents and sales prices to high levels. These contributions include fire apparatus, ambulances, fire houses, and very large sums of money for educational facilities, a cultural center and the township library.[6]

Still another restrictive land use regulation was adopted by the township through a supplement to the general zoning ordinance enacted in September 1972 creating a new zone, R-4, Planned Adult Retirement Community (PARC). The supplementary enactment designated a sizeable area as the zone—perhaps 200 acres—carved out of the R-1D and R-3 districts in the southwesterly sector. The enactment recited a critical shortage of adequate housing in the township suitable "for the needs and desires of senior citizens and certain other adults over the age of 52." The permission was essentially for single ownership development of the zone for multi-family housing (townhouses and apartments), thereafter to be either rented or sold as cooperatives or condominiums. The extensive development requirements detailed in the ordinance make it apparent that the scheme was not designed for, and would be beyond the means of, low and moderate income retirees. The highly restricted nature of the zone is found in the requirement that all permanent residents must be at least 52 years of age (except a spouse, immediate family member other than a child, live-indomestic [*sic*], companion or nurse). Children are limited to a maximum of one, over age 18, residing with a parent and there may be no more than three permanent residents in any one dwelling unit.[7]

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[6] The current township attorney, at oral argument, conceded, without specification, that many of these various conditions which had been required of developers were illegal.

[7] This court has not yet passed on the validity of any land use regulation which restricts residence on the basis of occupant age.

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All this affirmative action for the benefit of certain segments of the population is in sharp contrast to the lack of action, and indeed hostility, with respect to affording any opportunity for decent housing for the township's own poor living in substandard accommodations, found largely in the section known as Springville (R-3 zone). The 1969 Master Plan Report recognized it and recommended positive action. The continuous official reaction has been rather a negative policy of waiting for dilapidated premises to be vacated and then forbidding further occupancy. An earlier non-governmental effort to improve conditions had been effectively thwarted. In 1968 a private nonprofit association sought to build subsidized, multi-family housing in the Springville section with funds to be granted by a higher level governmental agency. Advance municipal approval of the project was required. The Township Committee responded with a purportedly approving resolution, which found a need for "moderate" income housing in the area, but went on to specify that such housing must be constructed subject to all zoning, planning, building and other applicable ordinances and codes. This meant single-family detached dwellings on 20,000 square foot lots. (Fear was also expressed that such housing would attract low income families from outside the township.) Needless to say, such requirements killed realistic housing for this group of low and moderate income families.[8]

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[8] The record is replete with uncontradicted evidence that, factually, low and moderate income housing cannot be built without some form of contribution, concession or incentive by some level of government. Such, under various state and federal methods,

(Footnote continued on following page)

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The record thoroughly substantiates the findings of the trial court that over the years Mount Laurel "has acted affirmatively to control development and to attract a selective type of growth" (119 N. J. Super. at 168) and that "through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used federal, state, county and local finances and resources[9] solely for the betterment of middle and upper-income persons." (119 N. J. Super. at 178).

There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on *property* (Mount Laurel is not a high tax municipality) and that the policy was carried out without regard for nonfiscal considerations with respect to *people,* either within or without its boundaries. This conclusion is demonstrated not only by what was done and what happened, as we have related, but also by innumerable direct statements of municipal officials at public meetings over the years which are found in the exhibits. The trial court referred to a number of them. 119 N. J. Super. at 169-170. No official testified to the contrary.

(Footnote continued from preceding page)

may take the form of public construction or some sort of governmental assistance or encouragement to private building. Multi-family rental units, at a high density, or, at most, low cost single-family units on very small lots, are economically necessary and in turn require appropriate local land use regulations.

[9] Such "finances and resources" has reference to monies spent by various agencies on highways within the municipality, loans and grants for water and sewer systems and for planning, federal guarantees of mortgages on new home construction, and the like.

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This policy of land use regulation for a fiscal end derives from New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children. The latter expense is much the largest, so, basically, the fewer the school children, the lower the tax rate. Sizeable industrial and commercial ratables are eagerly sought and homes and the lots on which they are situate are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs. Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.

This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing. There has been no effective intermunicipal or area planning or land use regulation. All of this is amply demonstrated by the evidence in this case as to Camden, Burlington and Gloucester counties. As to the similar situation generally in the state, see New Jersey Department of Community Affairs, Division of State and Regional Planning, *Land Use Regulation, The Residential Land Supply* (April 1972) (a study assembling and examining the nature and extent of municipal zoning practices in

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16 counties as affecting residential land available for low and moderate income housing) and Williams and Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey,* 22 *Syracuse L. Rev.* 475, 486-487 (1971). One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms (and, in Mount Laurel's case, even some of its own lower paid municipal employees) to live in the community where they work.

The other end of the spectrum should also be mentioned because it shows the source of some of the demand for cheaper housing than the developing municipalities have permitted. Core cities were originally the location of most commerce and industry. Many of those facilities furnished employment for the unskilled and semi-skilled. These employees lived relatively near their work, so sections of cities always have housed the majority of people of low and moderate income, generally in old and deteriorating housing. Despite the municipally confined tax structure, commercial and industrial ratables generally used to supply enough revenue to provide and maintain municipal services equal or superior to those furnished in most suburban and rural areas.

The situation has become exactly the opposite since the end of World War II. Much industry and retail business, and even the professions, have left the cities. Camden is a typical example. The testimonial and documentary evidence in this case as to what has happened to that city is depressing indeed. For various reasons, it lost thousands of jobs between 1950 and 1970, including more than half of its manufacturing jobs (a reduction from 43,267

to 20,671, while all jobs in the entire area labor market increased from 94,507 to 197,037). A large segment of retail business faded away with the erection of large suburban shopping centers. The economically better situated city residents helped fill up the miles of sprawling new housing developments, not fully served by public transit. In a society which came to depend more and more on expensive individual motor vehicle transportation for all purposes, low income employees very frequently could not afford to reach outlying places of suitable employment and they certainly could not afford the permissible housing near such locations. These people have great difficulty in obtaining work and have been forced to remain in housing which is overcrowded, and has become more and more substandard and less and less tax productive. There has been a consequent critical erosion of the city tax base and inability to provide the amount and quality of those governmental services—education, health, police, fire, housing and the like—so necessary to the very existence of safe and decent city life. This category of city dwellers desperately needs much better housing and living conditions than is available to them now, both in a rehabilitated city and in outlying municipalities. They make up, along with the other classes of persons earlier mentioned who also cannot afford the only generally permitted housing in the developing municipalities, the acknowledged great demand for low and moderate income housing.

II

The Legal Issue

The legal question before us, as earlier indicated, is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of any obligation to make possible a variety and choice of types of living accommodations.

[2, 3] We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.[10]

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[10] While, as the trial court found, Mount Laurel's actions were deliberate, we are of the view that the identical conclusion follows even when municipal conduct is not shown to be intentional, but the effect is substantially the same as if it were.

We reach this conclusion under state law and so do not find it necessary to consider federal constitutional grounds urged by plaintiffs. We begin with some fundamental principles as applied to the scene before us.

[4] Land use regulation is encompassed within the state's police power. Our constitutions have expressly so provided since an amendment in 1927. That amendment, now Art. IV, sec. VI, par. 2 of the 1947 Constitution, authorized legislative delegation of the power to municipalities (other than counties), but reserved the legislative right to repeal or alter the delegation (which we take it means repeal or alteration in whole or in part). The legislative delegation of the zoning power followed in 1928, by adoption of the standard zoning enabling act, now found, with subsequent amendments, in N.J.S.A. 40:55-30 to 51.

[5-9] It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution,[11] the requirements of which may be more demanding than those of the federal Constitution. *Robinson* v. *Cahill,* 62 N. J. 473, 482, 490-492 (1973); *Washington National Insurance Co.* v. *Board of Review,* 1 N. J. 545, 553-554

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[11] The paragraph reads:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

(1949). It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others). Conversely, a zoning enactment which is contrary to the general welfare is invalid. See generally, *e.g., Roselle* v. *Wright,* 21 N. J. 400, 409-410 (1956); *Katobimar Realty Co.* v. *Webster,* 20 N. J. 114, 122-123 (1955); *Schmidt* v. *Board of Adjustment of Newark,* 9 N. J. 405, 413-419 (1952); *Collins* v. *Board of Adjustment of Margate City,* 3 N. J. 200, 206 (1949). Indeed these considerations are specifically set forth in the zoning enabling act as among the various purposes of zoning for which regulations must be designed. N.J.S.A. 40:55-32. Their inclusion therein really adds little; the same requirement would exist even if they were omitted. If a zoning regulation violates the enabling act in this respect, it is also theoretically invalid under the state constitution. We say "theoretically" because, as a matter of policy, we do not treat the validity of most land use ordinance provisions as involving matters of constitutional dimension; that classification is confined to major questions of fundamental import. *Cf. Tidewater Oil Co.* v. *Mayor and Council of the Borough of Carteret,* 44 N. J. 338, 343 (1965). We consider the basic importance of housing and local regulations restricting its availability to substantial segments of the population to fall within the latter category.

The demarcation between the valid and the invalid in the field of land use regulation is difficult to determine, not always clear and subject to change. This was recognized almost fifty years ago in the basic case of *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926):

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> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. (272 U. S. at 387, 47 S. Ct. at 118, 71 L. Ed. at 310).

This court has also said as much and has plainly warned, even in cases decided some years ago sanctioning a broad measure of restrictive municipal decisions, of the inevitability of change in judicial approach and view as mandated by change in the world around us. *Lionshead Lake, Inc.* v. *Township of Wayne,* 10 N. J. 165, 172-173 (1952), appeal dismissed 344 U. S. 919, 73 S. Ct. 386, 97 L. Ed. 708 (1953) (approving requirement of minimum floor area for dwellings, the same in all residential districts); *Fischer* v. *Township of Bedminster,* 11 N. J. 194, 205 (1952) (sanctioning minimum lot area of five acres in a then rural municipality); *Pierro* v. *Baxendale,* 20 N. J. 17, 29 (1955) (holding valid an ordinance permitting boarding and rooming houses, but not hotels and motels, in residential districts); *Vickers* v. *Township Committee of Gloucester Township,* 37 N. J. 232, 250 (1962), *cert.* den. 371 U. S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963) (sustaining ordinance provisions prohibiting mobile home parks throughout the township). The warning is perhaps best put in *Pierro*:

> We are aware of the extensive academic discussion following the decisions in the *Lionshead* and *Bedminster* cases, *supra,* and the suggestion that

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> the very broad principles which they embody may intensify dangers of economic segregation which even the more traditional modes of zoning entail • • •. In the light of existing population and land conditions within our State these [municipal zoning] powers may fairly be exercised without in anywise endangering the needs or reasonable expectations of any segments of our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed. (20 N. J. at 29).

The warning implicates the matter of *whose* general welfare must be served or not violated in the field of land use regulation. Frequently the decisions in this state, including those just cited, have spoken only in terms of the interest of the enacting municipality, so that it has been thought, at least in some quarters, that such was the only welfare requiring consideration. It is, of course, true that many cases have dealt only with regulations having little, if any, outside impact where the local decision is ordinarily entitled to prevail. However, it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.

This essential was distinctly pointed out in *Euclid,* where Mr. Justice Sutherland specifically referred to "• • • the possibility of cases where the general public

interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." (272 U. S. at 390, 47 S. Ct. at 119, 71 L. Ed. at 311). Chief Justice Vanderbilt said essentially the same thing, in a different factual context, in the early leading case of *Duffcon Concrete Products, Inc.* v. *Borough of Cresskill,* 1 N. J. 509 (1949), when he spoke of the necessity of regional considerations in zoning and added this:

> • • • The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines. Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality. (1 N. J. at 513).

See, to the same general effect, *Borough of Cresskill* v. *Borough of Dumont,* 15 N. J. 238, 247-249 (1954).

In recent years this court has once again stressed this non-local approach to the meaning of "general welfare" in cases involving zoning as to facilities of broad public benefit as distinct from purely parochial interest. See *Roman Catholic Diocese of Newark* v. *Ho-Ho-Kus Borough,* 42 N. J. 556, 566 (1964), Id., 47 N. J. 211 (1966).

In this case we pointed out local action with respect to private educational projects largely benefitting those residing outside the borough must be exercised "with due concern for values which transcend municipal lines." (47 N. J. at 218). Likewise in *Kunzler* v. *Hoffman,* 48 N. J. 277 (1966), a case unsucessfully attacking a use variance granted a private hospital to serve the emotionally disturbed in a wide area of the state, we rejected the contention that local zoning authorities are limited to a consideration of only those benefits to the general welfare which would be received by residents of the municipality, pointing out that "general welfare" in the context there involved "comprehends the benefits not merely within municipal boundaries but also those to the regions of the State relevant to the public interest to be served." 48 N. J. at 288.

This brings us to the relation of housing to the concept of general welfare just discussed and the result in terms of land use regulation which that relationship mandates. There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. See *Robinson* v. *Cahill, supra* (62 N. J. at 483). "The question of whether a citizenry has adequate and sufficient housing is certainly one of the prime considerations in assessing the general health and welfare of that body." *New Jersey Mortgage Finance Agency* v. *McCrane,* 56 N. J. 414, 420 (1970). *Cf. DeSimone* v. *Greater Englewood Housing Corp. No. 1,* 56 N. J. 428, 442 (1970). The same thought is implicit in the legislative findings of an extreme, long-time need in this state for decent low and moderate income housing, set forth in the numerous statutes providing for various agencies and methods at both state and local levels designed to aid in alleviation of

the need. See, *e.g.*, Mortgage Finance Agency Law, N.J. S.A. 17:1B-5 (L. 1970, c. 38); Department of Community Affairs Demonstration Grant Law, N.J.S.A. 52:27D-61 (L. 1967, c. 82); Local Housing Authorities Law, N.J.S.A. 55:14A-2 (L. 1938, c. 19); Housing Co-operation Law, N.J.S.A. 55:14B-2 (L. 1938, c. 20); Redevelopment Companies Law, N.J.S.A. 55:14D-2 (L. 1944, c. 169); State Housing Law, N.J.S.A. 55:14H-2 (L. 1949, c. 303); Senior Citizens Nonprofit Rental Housing Tax Law, N.J.S.A. 55:14I-2 (L. 1965, c. 92); Housing Finance Agency Law, N.J.S.A. 55:14J-2 (L. 1967, c. 81); Limited-Dividend Nonprofit Housing Corporations or Associations Law, N.J. S.A. 55:16-2 (as amended L. 1967, c. 112).

[10-12] It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.

It is also entirely clear, as we pointed out earlier, that most developing municipalities, including Mount Laurel,

have not met their affirmative or negative obligations, primarily for local fiscal reasons. Governor Cahill summed it up in his 1970 special legislative message, *A Blueprint for Housing in New Jersey, supra,* at 10-11:

> We have reached a point in the State where the zoning criteria in many municipalities is two-fold; dwelling units of all kinds must be curtailed; industrial development must be encouraged. This is a far cry from the original concept of municipal zoning and planning * * *.
>
> The fundamental objective of (the) constitutional amendment and the implementing Municipal Zoning Enabling Act was local control of zoning and planning for the purpose of effecting the public good * * *. The original concept of local planning and zoning never contemplated prohibition in lieu of regulation nor the welfare of the few in place of the general welfare.

The exclusionary details are fully set forth in *Land Use Regulation, The Residential Land Supply,* previously referred to.

In sum, we are satisfied beyond any doubt that, by reason of the basic importance of appropriate housing and the longstanding pressing need for it, especially in the low and moderate cost category, and of the exclusionary zoning practices of so many municipalities, conditions have changed, and consistent with the warning in *Pierro, supra,* judicial attitudes must be altered from that espoused in that and other cases cited earlier, to require, as we have just said, a broader view of the general welfare and the presumptive obligation on the part of de-

veloping municipalities at least to afford the opportunity by land use regulations for appropriate housing for all.

[13] We have spoken of this obligation of such municipalities as "presumptive." The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action. *Robinson* v. *Cahill, supra,* 62 N. J. at 491-492, and cases cited therein. The substantive aspect of "presumptive" relates to the specifics, on the one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do. Both kinds of specifics may well vary between municipalities according to peculiar circumstances.

We turn to application of these principles in appraisal of Mount Laurel's zoning ordinance, useful as well, we think, as guidelines for future application in other municipalities.

The township's general zoning ordinance (including the cluster zone provision) permits, as we have said, only

one type of housing—single-family detached dwellings. This means that all other types—multi-family including garden apartments and other kinds housing more than one family, town (row) houses, mobile home parks—are prohibited.[12] Concededly, low and moderate income housing has been intentionally excluded. While a large percentage of the population living outside of cities prefers a one-family house on its own sizeable lot, a substantial proportion do not for various reasons. Moreover, single-family dwellings are the most expensive type of quarters nad [*sic*] a great number of families cannot afford them.[13]

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[12] Zoning ordinance restriction of housing to single-family dwellings is very common in New Jersey. Excluding six large, clearly rural townships, the percentage of remaining land zoned for multi-family use is only just over 1% of the net residential land supply in 16 of New Jersey's 21 counties (not included are Atlantic, Cumberland, Cape May, Salem and Hudson counties). See *Land Use Regulation, The Residential Land Supply, supra,* pp. 10-13. (It is well known the considerable numbers of privately built apartments have been constructed in recent years in municipalities throughout the state, not allowed by ordinance, by the use variance procedure. N.J.S.A. 40:55-39(d). While the special exception method, N.J.S.A. 40:55-39(b), is frequently appropriate for the handling of such uses, it would indeed be the rare case where proper "special reasons" could be found to validly support a subsection (d) variance for such privately built housing.) Pennsylvania has held it unconstitutional for a developing municipality to fail to provide for apartments anywhere within it. *Appeal of Girsh,* 437 Pa. 237, 263 A. 2d 395 (1970).

[13] Some authorities suggest that such dwellings are rapidly becoming financially possible only for those of relatively high income. See *New Jersey Trends,* ch. 24, *Sternlieb, Introduction: Is This The End of the American Dream House?,* p. 302 (Institute for Environmental Studies, Rutgers University, 1974).

Certainly they are not pecuniarily feasible for low and moderate income families, most young people and many elderly and retired persons, except for some of moderate income by the use of low cost construction on small lots.

[14, 15] As previously indicated, Mount Laurel has allowed some multi-family housing by agreement in planned unit developments, but only for the relatively affluent and of no benefit to low and moderate income families. And even here, the contractual agreements between municipality and developer sharply limit the number of apartments having more than one bedroom.[14] While the township's PUD ordinance has been repealed, we mention the subject of bedroom restriction because, assuming the overall validity of the PUD technique (see footnote (5), *supra*), the measure could be reenacted and the subject is of importance generally. The design of such limitations is obviously to restrict the number of families in the municipality having school age children and thereby keep down local education costs.[15] Such restrictions are so clearly contrary to the general welfare as not to require further discussion. *Cf. Molino* v. *Mayor and Council of*

[14] Apartment bedroom restrictions are also common in municipalities of the state which do allow multi-family housing. About 60% of the area zoned to permit multi-family dwellings is restricted to efficiency or one-bedroom apartments; another 20% permits two-bedroom units and only the remaining 20% allows units of three bedrooms or larger. See *Land Use Regulation, The Residential Land Supply, supra,* pp. 11-12.

[15] For a full report on the fiscal aspects of multi-family housing, see New Jersey County & Municipal Government Study Commission, *Housing & Suburbs, Fiscal & Social Impact of Multifamily Development* (1974).

Borough of Glassboro, 116 N. J. Super. 195 (Law Div. 1971).

Mount Laurel's zoning ordinance is also so restrictive in its minimum lot area, lot frontage and building size requirements, earlier detailed, as to preclude single-family housing for even moderate income families. Required lot area of at least 9,375 square feet in one remaining regular residential zone and 20,000 square feet (almost half an acre) in the other, with required frontage of 75 and 100 feet, respectively, cannot be called small lots and amounts to low density zoning, very definitely increasing the cost of purchasing and improving land and so affecting the cost of housing.[16] As to building size, the township's general requirements of a minimum dwelling floor area of 1,100 square feet for all one-story houses and 1,300 square feet for all of one and one-half stories or higher is without regard to required minimum lot size or frontage or the number of occupants (see *Sente* v. *Mayor and Municipal Council of City of Clifton,* 66 N. J. 204, 208-209 (1974)). In most aspects these requirements are greater even than those approved in *Lionshead Lake, Inc.* v. *Township of Wayne, supra,* 10 N. J. 165, almost 24 years ago

[16] These restrictions are typical throughout the state. As shown in *Land Use Regulation, The Residential Land Supply, supra,* pp. 14-16, in the 16 counties covered by that study, only 14.1% of the available single-family land is allowed to be in lots of less than one-half acre, only 5.1% (and that mostly in urban counties) in those of less than 10,000 square feet, and 54.7% of it requires lots of from one to three acres.

The same study, pp. 17-18, demonstrates that only as to 13.5% of the available single-family land is a frontage of less than 100 feet required, 32.2% requires 100-149 feet, 23.3%, 150-199 feet and 31%, 200 feet or more.

and before population decentralization, outer suburban development and exclusionary zoning had attained today's condition. See also Williams and Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited,* 1969 Wis. L. Rev. 827.[17] Again it is evident these requirements increase the size and so the cost of housing. The conclusion is irresistible that Mount Laurel permits only such middle and upper income housing as it believes will have sufficient taxable value to come close to paying its own governmental way.

Akin to large lot, single-family zoning restricting the population is the zoning of very large amounts of land for industrial and related uses. Mount Laurel has set aside almost 30% of its area, over 4,100 acres, for that purpose; the only residential use allowed is for farm dwellings. In almost a decade only about 100 acres have been developed industrially. Despite the township's strategic location for motor transportation purposes, as intimated earlier, it seems plain that the likelihood of anywhere near the whole of the zoned area being used for the intended purpose in the foreseeable future is remote indeed and that an unreasonable amount of land has thereby been removed from possible residential development, again seemingly for local fiscal reasons.[18]

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[17] Minimum floor area requirements exist as to all but 8% of the available residential land supply in the 16 counties studied in *Land Use Regulation, The Residential Land Supply, supra,* pp. 18-20; the Mount Laurel dimensions are representative of those most commonly imposed.

[18] *Land Use Regulation, The Residential Land Supply, supra,* pp. 6-8, shows that in the 16 county area only 14.7% of the net land supply is zoned for industrial uses (including offices and research laboratories). 3.6% is zoned for commercial uses and the remainder (81.7%) for residential uses of all types.

[16] Without further elaboration at this point, our opinion is that Mount Laurel's zoning ordinance is presumptively contrary to the general welfare and outside the intended scope of the zoning power in the particulars mentioned. A facial showing of invalidity is thus established, shifting to the municipality the burden of establishing valid superseding reasons for its action and non-action.[19] We now examine the reasons it advances.

The township's principal reason in support of its zoning plan and ordinance housing provisions, advanced especially strongly at oral argument, is the fiscal one previously adverted to, *i. e.,* that by reason of New Jersey's tax structure which substantially finances municipal governmental and educational costs from taxes on local real property, every municipality may, by the exercise of the zoning power, allow only such uses and to such extent as will be beneficial to the local tax rate. In other words, the position is that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce, and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.

[17, 18] We have previously held that a developing municipality may properly zone for and seek industrial ratables to create a better economic balance for the community *vis-a-vis* educational and governmental costs engendered by residential development, provided that such was "• • • done reasonably as part of and in furtherance

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[19] The township has not been deprived of the opportunity to present its defense on this thesis, since the case was very thoroughly tried out with voluminous evidence on all aspects on both sides.

of a legitimate comprehensive plan for the zoning of the entire municipality." *Gruber* v. *Mayor and Township Committee of Raritan Township,* 39 N. J. 1, 9-11 (1962). We adhere to that view today. But we were not there concerned with, and did not pass upon, the validity of municipal exclusion by zoning of types of housing and kinds of people for the same local financial end. We have no hesitancy in now saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities.

[19] The propriety of zoning ordinance limitations on housing for ecological or environmental reasons seems also to be suggested by Mount Laurel in support of the one-half acre minimum lot size in that very considerable portion of the township still available for residential development. It is said that the area is without sewer or water utilities and that the soil is such that this plot size is required for safe individual lot sewage disposal and water supply. The short answer is that, this being flat land and readily amenable to such utility installations, the township could require them as improvements by developers or install them under the special assessment or other appropriate statutory procedure. The present environmental situation of the area is, therefore, no sufficient excuse in itself for limiting housing therein to single-family dwellings on large lots. *Cf. National Land and Investment Co.* v. *Kohn,* 419 Pa. 504, 215 A. 2d 597 (1965). This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered. Generally only a relatively small portion of a developing municipality will be involved, for, to have a valid effect, the danger and impact must be substantial and very real (the construction of every building or the improvement of every plot has some environmental impact)—not simply a makeweight to support exclusionary housing measures or preclude growth—and the regulation adopted must be only that reasonably necessary for public protection of a vital interest. Otherwise difficult additional problems relating to a "taking" of a property owner's land may arise. See *AMG Associates* v. *Township of Springfield,* 65 N. J. 101, 112, n. (4) (1974).

[20-23] By way of summary, what we have said comes down to this. As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply for these needs. Certainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses. (If planned unit

developments are authorized, one would assume that each must include a reasonable amount of low and moderate income housing in its residential "mix," unless opportunity for such housing has already been realistically provided for elsewhere in the municipality.) The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related to the present and future potential for such purposes. In other words, such municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.[20]

[24] We have earlier stated that a developing municipality's obligation to afford the opportunity for decent and adequate low and moderate income housing extends at least to "* * * that municipality's fair share of the present and prospective regional need therefor."[21] Some comment

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[20] This case does not properly present the question of whether a developing municipality may time its growth and, if so, how. See, *e. g., Golden* v. *Planning Board of the Town of Ramapo,* 30 N. Y. 2d 359, 334 N. Y. S. 2d 138, 285 N. E. 2d 291 (1972), appeal dismissed 409 U.S. 1003, 93 S. Ct. 436, 440, 34 L. Ed. 2d 294 (1972); *Construction Industry Association of Sonoma County* v. *City of Petaluma,* 375 F. Supp. 574 (N. D. Cal. 1974), appeal pending (citation of these cases is not intended to indicate either agreement or disagreement with their conclusions). We now say only that, assuming some type of timed growth is permissible, it cannot be utilized as an exclusionary device or to stop all further development and must include early provision for law [*sic*] and moderate income housing.

[21] This was said with the realization that most of such housing will require some form of governmental subsidy or assistance at some level to construct and, if the present tax structure remains un-

(Footnote continued on following page)

on that conclusion is in order at this point. Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But, under present New Jersey legislation, zoning must be on an individual

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(Footnote continued from preceding page)

changed, perhaps also some assistance to the municipality itself in connection with the furnishing of the additional local services required. See recommendations, *Housing & Suburbs, Fiscal & Social Impact of Multifamily Development, supra,* pp. 123, *et seq.*

We further agree with the statement in the separate summary of the cited study, p. 2: "We recognize that new development, whatever the pace of construction, will never be the source of housing for more than a small part of the State's population. The greater part of New Jersey's housing stock is found and will continue to be found in the central cities and older suburbs of the State * * *." (Substantial housing rehabilitation, as well as general overall revitalization of the cities, is, of course, indicated.) So, while what we decide today will produce no mass or sudden emigration of those of low and moderate income from the central cities and older suburbs to the developing municipalities, our conception of state law as applied to land use regulation affecting housing requires that the fair opportunity therefor be afforded at once, with the expectation and purpose that the opportunity will come to fruition in the near future through private or public enterprises, or both, and result in available housing in the developing municipalities for a goodly number of the various categories of people of low and moderate income who desire to live, therein and now cannot.

municipal basis, rather than regionally.[22] So long as that situation persists under the present tax structure, or in the absence of some kind of binding agreement among all the municipalities of a region, we feel that every municipality therein must bear its fair share of the regional burden. (In this respect our holding is broader than that of the trial court, which was limited to Mount Laurel-related low and moderate income housing needs.)

The composition of the applicable "region" will necessarily vary from situation to situation and probably no

[22] This court long ago pointed out "* * * the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality." *Duffcon Concrete Products, Inc.* v. *Borough of Cresskill, supra* (1 N. J. at 513). It is now clear that the Legislature accepts the fact that at least land use *planning*, to be of any value, must be done on a much broader basis than each municipality separately. Note the statutes establishing county planning boards, with the duty to prepare a county master plan and requiring that board's review and approval of certain subdivisions, N. J. S. A. 40:27-1 to 8; authorizing voluntary regional planning boards, N. J. S. A. 40:27-9 to 11; creating state planning and coordinating functions in the Department of Community Affairs and its Division of State and Regional Planning, N.J.S.A. 52:-27D-6 and 9 and 13:1B-5.1 and 15.52; and providing for New Jersey to join with New York and Connecticut in the establishment of the Tri-State Regional Planning Commission with extensive area planning functions, N.J.S.A. 32:22B-1, *et seq.* (Federal statutes and regulations require many federal grants for local public works and installations to have the approval of regional planning agencies, consistent with comprehensive area plans.) Authorization for regional *zoning*—the implementation of planning —, or at least regulation of land uses having a substantial external impact by some agency beyond the local municipality, would seem to be logical and desirable as the next legislative step.

hard and fast rule will serve to furnish the answer in every case. Confinement to or within a certain county appears not to be realistic, but restriction within the boundaries of the state seems practical and advisable. (This is not to say that a developing municipality can ignore a demand for housing within its boundaries on the part of people who commute to work in another state.) Here we have already defined the region at present as "those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden City." The concept of "fair share" is coming into more general use and, through the expertise of the municipal planning adviser, the county planning boards and the state planning agency, a reasonable figure for Mount Laurel can be determined, which can then be translated to the allocation of sufficient land therefor on the zoning map. See generally, *New Jersey Trends,* ch. 27, *Listokin, Fair Share Housing Distribution: An Idea Whose Time Has Come?,* p. 353.[23] We may add that we think that, in arriving at such a determination, the type of information and estimates, which the trial judge (119 N. J. Super. at 178) directed the township to compile and furnish to him, concerning the housing needs of persons of low and moderate income now or formerly residing in the township in substandard dwellings and those presently employed or reasonably expected to be employed therein, will be pertinent.

There is no reason why developing municipalities like Mount Laurel, required by this opinion to afford the oppor-

[23] The questions mentioned in this paragraph are more fully involved in *Oakwood at Madison* v. *Township of Madison, supra,* 128 N. J. Super. 438, appeal pending unheard in this court.

tunity for all types of housing to meet the needs of various categories of people, may not become and remain attractive, viable communities providing good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand. They can have industrial sections, commercial sections and sections for every kind of housing from low cost and multifamily to lots of more than an acre with very expensive homes. Proper planning and governmental cooperation can prevent over-intensive and too sudden development, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty. We do not intend that developing municipalities shall be overwhelmed by voracious land speculators and developers if they use the powers which they have intelligently and in the broad public interest. Under our holdings today, they can be better communities for all than they previously have been.

III

The Remedy

As outlined at the ouset of this opinion, the trial court invalidated the zoning ordinance *in toto* and ordered the township to make certain studies and investigations and to present to the court a plan of affirmative public action designed "to enable and encourage the satisfaction of the indicated needs" for township related low and moderate income housing. Jurisdiction was retained for judicial consideration and approval of such a plan and for the entry of a final order requiring its implementation.

We are of the view that the trial court's judgment should be modified in certain respects. We see no reason why the

entire zoning ordinance should be nullified. Therefore we declare it to be invalid only to the extent and in the particulars set forth in this opinion. The township is granted 90 days from the date hereof, or such additional time as the trial court may find it reasonable and necessary to allow, to adopt amendments to correct the deficiencies herein specified. It is the local function and responsibility, in the first instance at least, rather than the court's, to decide on the details of the same within the guidelines we have laid down. If plaintiffs desire to attack such amendments, they may do so by supplemental complaint filed in this cause within 30 days of the final adoption of the amendments.

[25] We are not at all sure what the trial judge had in mind as ultimate action with reference to the approval of a plan for affirmative public action concerning the satisfaction of indicated housing needs and the entry of a final order requiring implementation thereof. Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mount Laurel must do in that regard. It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power. See, however, *Pascack Association* v. *Mayor and Council of Township of Washington,* 131 N. J. Super. 195 (Law Div. 1974), and cases therein cited, for a discussion of this question. The municipality should

first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable. (We have in mind that there is at least a moral obligation in a municipality to establish a local housing agency pursuant to state law to provide housing for its resident poor now living in dilapidated, unhealthy quarters.) The portion of the trial court's judgment ordering the preparation and submission of the aforesaid study, report and plan to it for further action is therefore vacated as at least premature. Should Mount Laurel not perform as we expect, further judicial action may be sought by supplemental pleading in this cause.

The judgment of the Law Division is modified as set forth herein. No costs.

MOUNTAIN, J. (concurring). I agree with the conclusions reached in the Court's opinion and essentially with the opinion itself. In one important respect, however, I disagree. The Court rests its decision upon a ground of State constitutional law. I reach the same result by concluding that the term, "general welfare," appearing in N.J.S.A. 40:55-32, can and should properly be interpreted with the same amplitude attributed to that phrase in the opinion of the Court, as well as otherwise in the manner there set forth. I therefore would rest the conclusions we here announce upon an interpretation of the statute, and not upon the State constitution.

Accordingly, since I read the statute—without resort to the Constitution—to justify, if not compel, our decision, I find it unnecessary to express any view as to the merits of the constitutional argument set forth in the Court's opinion.

PASHMAN, J. (concurring). With this decision, the Court begins to cope with the dark side of municipal land use regulation—the use of the zoning power to advance the parochial interests of the municipality at the expense of the surrounding region and to establish and perpetuate social and economic segregation.

The problem is not a new one. Early opponents of zoning advanced the possibility of such abuse as an argument against allowing municipalities the power to zone. *See, e. g., Ambler Realty Co.* v. *Euclid,* 297 F. 307, 316 (N. D. Ohio 1924), rev'd 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Later, even those sympathetic to the goals and methods of zoning began to express concern. See, *e. g.,* Haar, Zoning for Minimum Standards: The Wayne Township Case," 66 *Harv. L. Rev.* 1051 (1953). In that spirit, Justice Jacobs wrote for this Court in *Pierro* v. *Baxendale,* 20 N. J. 17, 29 (1955):

> We are aware of the extensive academic discussion following the decisions in the *Lionshead* and *Bedminster* cases, *supra,* and the suggestion that the very broad principles which they embody may intensify dangers of economic segregation which even the more traditional modes of zoning entail. • • • In the light of existing population and land conditions within our State these powers may fairly be exercised without in anywise endangering the needs or reasonable expectations of any segments of our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed.

Appendix A

The growth of the new suburbs, first as affluent residential communities and, more recently, as sites for commercial and industrial development, leaving persons with low or even moderate incomes housed inadequately in the cities and the older, inner suburbs, far from new sources of employment, magnified the importance of the problem, moving it from the realm of speculation to that of physical and social reality. Justice Hall was among the first to recognize the new significance of the problem in his now classic dissent to *Vickers* v. *Gloucester Tp.*, 37 N. J. 232, 252 (1962), appeal dismissed 371 U. S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963). The facts of this case, as well as the information compiled by various governmental agencies, of which the Court may take notice, *e. g., Nat'l Comm'n on Urban Problems, Building the American City,* H. R. Doc. No. 34, 91st Cong. 1st Sess. 211 (1968); *N. J. Dept. of Community Affairs, Land Use Regulation: The Residential Land Supply* (1972),[1] demonstrate that judicial action in this area is long overdue.

Therefore, I join in the thoughtful and eloquent majority opinion of Justice Hall. I differ from the majority only in that I would have the Court go farther and faster in its implementation of the principles announced today. The fact that abuses of the municipal zoning power are now widespread and derive from attitudes and premises deeply ingrained in the suburban planning and zoning processes requires that the Court not restrict itself to the facts of this particular case but, rather, lay down broad guidelines for judicial review of municipal zoning decisions which implicate these abuses. *Cf. Busik* v. *Levine,*

[1] Hereinafter cited as *Building the American City and The Residential Land Supply,* respectively.

Appendix A

63 N. J. 351, 363-64 (1973), appeal dismissed 414 U. S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973).

I

The misuse of the municipal zoning power at issue in this case, generically described as "exclusionary zoning," *see, e. g., Brooks, Exclusionary Zoning* 3 (Am. Soc'y of Planning Officials 1970), involves two distinct but interrelated practices: (1) the use of the zoning power by municipalities to take advantage of the benefits of regional development without having to bear the burdens of such development; and (2) the use of the zoning power by municipalities to maintain themselves as enclaves of affluence or of social homogeneity.

Both of these practices are improper and to be strongly condemned. They are violative of the requirement, found both in the Constitution of 1947, Art. I, § 1 and the zoning enabling statute itself, N.J.S.A. 40:55-32, that municipal zoning ordinances further the general welfare. *Cf. Cresskill* v. *Dumont,* 15 N. J. 238, 247-49 (1954); *Duffcon Concrete Products, Inc.* v. *Cresskill,* 1 N. J. 509 (1949). They are inconsistent with the fundamental premise of the New Jersey zoning legislation that zoning is concerned with the physical condition of the municipality not its social condition. In a deeper sense, they are repugnant to the ideals of the pluralistic democracy which America has become.

The motivation for exclusionary zoning practices are deeply embedded in the nature of suburban development. In part, these practices are motivated by fear of the fiscal consequences of opening the community to all social and

economic classes. Residents of the municipality anticipate that higher density development will require the construction of additional roads, sewers, and water systems, the provision of additional municipal services, and the increase of school expenditures, all of which must be financed through local property taxes. Often, although not universally, this is a reasonable concern, *see generally Sternlieb, Residential Development, Urban Growth and Municipal Costs* (1973); *N. J. Sty. & Mun. Gov. Study Comm'n Housing & Suburbs: Fiscal & Social Impact of Multifamily Development* (1974), and, as long as these costs are primarily financed through local property taxes, will continue to impel suburban communities to use the zoning laws to encourage commercial development and discourage settlement of less affluent families. *But cf. Robinson* v. *Cahill,* 62 N. J. 473 (1973), *cert.* denied 414 U. S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). Insofar as this fiscal situation prevails, suburban communities will find the temptation of exclusionary zoning alluring.

In addition, exclusionary zoning practices are also often motivated by fear of and prejudices against other social, economic, and racial groups.[2] *Nat'l Comm. Against Discrimination in Housing, Jobs and Housing: Final Summary Report on the Housing Component,* 25-29 (1972). Thus, in a recent survey of suburban municipal leaders, 42.6% identified social and racial conflict as being the chief impact of low and moderate cost subsidized housing on the municipality, while only 21.3% identified fiscal problems as the chief impact. *Cty. & Mun. Gov. Study Comm'n, Housing & Suburbs: Fiscal & Social Impact of*

[2] Defendant contends that no such motivation is at work in this case. I, like my brethren, accept that claim.

Multifamily Development, supra at 86. A large proportion felt that even State assumption of the additional municipal costs of a balanced housing policy would not make a great impact on the general unacceptability of low or moderate income housing. *Id.* at 89. Nor are these attitudes, however disappointing we may find them at this late date, wholly surprising. Many people who settle in suburban areas do so with the specific intention of living in affluent, socially homogeneous communities and of escaping what they perceive to be the problems of the cities. *See generally, Clawson, Suburban Land Conversion in the United States,* 45 (1971). They do not wish their insular communities to be disturbed by the introduction of diverse social, racial, and economic groups. The experience of the nation over the past 20 years must serve as a caution that, however much we might wish it, we cannot expect rapid, voluntary reversal of such attitudes.

Exclusionary zoning may assume a wide variety of forms. Ultimately, the existence of such practices must be measured by exclusionary intent and actual or potential exclusionary effect. *Cf. Hawkins* v. *Shaw,* 437 F. 2d 1286 (5 Cir. 1971); *Hobson* v. *Hansen,* 269 F. Supp. 401 (D. D. C. 1967), *aff'd sub nom. Smuck* v. *Hobson,* 132 U. S. App. D. C. 372, 408 F. 2d 175 (D. C. Cir. 1969). Some zoning devices, however, which are inherently exclusionary in effect or which lend themselves especially readily to abuse have come into wide-spread use and are a revealing gauge of the extent of exclusionary zoning in New Jersey:

Appendix A

1) *Minimum house size requirements*

As of 1970, 92% of the land in the Department of Community Affairs study area[3] zoned for single family housing was covered by some minimum house size requirement. More than 65% was zoned for houses with 1,000 square feet or more of floor space, and 38.9% for houses of 1,200 square feet or more. By contract [*sic*], the controversial case of *Lionshead Lake* v. *Wayne Tp.*, 10 N. J. 165 (1953), appeal dismissed 344 U. S. 919, 73 S. Ct. 386, 97 L. Ed. 708 (1953), upheld a minimum of 768 square feet in all districts. There is wide variation from county to county and within the various counties.[4] In the so-called "outer-ring" counties in northern New Jersey—Morris,

[3] The Department of Community Affairs surveyed the use of exclusionary devices in municipal zoning laws as of 1970. The study area included all developable land in New Jersey except that in Atlantic, Cape May, Cumberland, Hudson, and Salem Counties and in the Hackensack Meadowlands District. *The Residential Land Supply, supra.* All figures in this opinion as to the extent of use of various zoning provisions are based on that study. For other analyses of Department of Community Affairs data, see Special Message to the Legislature by Governor Cahill, *A Blueprint for Housing in New Jersey,* Dec. 7, 1970; Williams & Norman, "Exclusionary Land Use Controls: the Case of North-eastern New Jersey, 22 *Syracuse L. Rev.* 476 (1971); *Sagalyn & Sternlieb, Zoning and Housing Costs,* 93-115 (1972); *Nat'l Comm. Against Discrimination in Housing, Jobs and Housing: Final Summary Report on the Housing Component, supra* at 25-37.

[4] The extreme case is Morris County, where 87% of the land zoned for single family housing had a 1,200 square foot minimum floor space requirement and 66.3% had a 1,600 square foot or more minimum. In Burlington, only 54.7% was zoned for 1,000 square feet or more and 24% had no minimum house size requirement at all.

Appendix A

Somerset, Middlesex, and Monmouth[5]—houses of less than 1,000 square feet may be built on only about 10% of the land zoned for single family dwellings. On 77% of the land zoned for single family dwellings, houses must have 1,200 square feet or more of floor space. In the South Jersey outer-ring counties, Burlington, Camden, and Gloucester, the figures are 31.9% and 43.5% respectively.

The effect on the cost of housing of such requirements is obvious. If one assumes construction costs of $20 per square foot of floor space,[6] a 1,000 square foot minimum imposes a corresponding minimum figure of $20,000 upon the portion of the cost of a new house attributable to construction. A recent study of housing costs indicates that floor space is the single most important factor contributing to differences in prices for new housing, even more im-

[5] The term "outer-ring" is used here in the same sense as it is used in the majority opinion, *ante* at 162. *See Williams & Norman, supra* at 479. It should be noted that this term is not used consistently by professional planners. The Regional Plan Association, the principal New York planning group, describes the counties referred to here as "outer-ring" counties as the "intermediate ring," reserving the former term for more outlaying areas, Sussex, Warren, Hunterdon, and Ocean. *Clawson, supra* at 368. The Delaware Valley Regional Planning Commission, the principal Philadelphia planning group, does not describe suburban development in the Philadelphia region in terms of concentric "rings" at all, perhaps because development in that region has been more blotchy. *Id.* at 291.

[6] This concededly is an oversimplified measure, *see Williams & Norman, supra* at 481 n. 13, but one widely used by persons in the housing construction industry. *The Residential Land Supply,* at 18. The $20 figure was considered conservative at the time of publication of the Department of Community Affairs study in 1972. *Id.*

portant than the socio-economic status of the municipality. *Sagalyn & Sternlieb, supra,* at 48.

2) *Minimum lot size and minimum frontage requirements*

On two-thirds of the land in the Department of Community Affairs study area zoned in 1970 for single family dwellings, houses could not be built on lots of less than an acre. Upon only 5.1% could houses be built on 10,000 square feet or less. Approximately 10% of such land in the outer-ring counties in South Jersey was zoned for 10,000 square foot lots or less; 45.9% was zoned for an acre or more. In the North Jersey outer-ring counties only 1.2% of the land zoned for single family dwellings was available for use as lots of 10,000 square feet or less; 77% was zoned for one acre or larger lots. Here, too, there are wide variations among counties. In Camden, 24.5% of the land was zoned for lots of 10,000 square feet or less, and less than 34% for lots of an acre or more. In Somerset County, only .2% of the land was zoned for lots of 10,000 square feet or less; 85.3% was zoned for lots of an acre or more, and 24.6% was zoned for three acres or more. By way of comparison, the American Public Health Association, a vigorous advocate of high minimum standards, recommends 6,000 square feet as a suitable minimum lot size based upon health considerations. *Am. Public Health Ass'n, Planning the Neighborhood,* 37 (1948).

Minimum frontage requirements frequently, although not invariably, are found together with minimum lot size requirements. *The Residential Land Supply* at 21-24. Only 13.5% of the land zoned in 1970 for single family housing in the Department of Community Affairs study area was zoned for 100 foot minimum frontage or less. In that area, 54.3% was zoned for 150 feet or more. This device was

widely used in the northern outer-ring counties, where only 5% of the land is zoned for less than 100 foot frontage and 68.4% is zoned for more than 150 feet, but somewhat less widely used in the southern outer-ring counties, where 22.7% of the land was zoned for less than 100 foot frontage and 42.5% was zoned for more than 150 feet.

Analysis of the exclusionary impact of the widespread use of minimum lot size and minimum frontage requirements is a more complex task than that of analyzing minimum building requirements. *See generally, Building the American City, supra at* 213-15; *Williams & Norman, supra* at 493-97; *Sagalyn & Sternlieb, supra* at 6-16, 66-67. There is a significant correlation between lot size and price of housing in areas without sewage service and between frontage and price in areas with sewage service. *Sagalyn & Sternlieb, supra* at 54-56. At the very least, it can be said with certainty that extensive mapping for large lots or large lot widths drives up the cost of smaller lots and thereby significantly raises the overall price of housing. *Williams & Norman, supra* at 496-97.

3) *Prohibition of multifamily housing*

Realistically, much of the housing needs of persons with low or moderate incomes will have to be met through various forms of multifamily housing. *Williams & Norman, supra* at 481. Hence, restrictions upon the construction of such housing have a highly exclusionary effect. In the Department of Community Affairs study area, construction of multifamily housing was permitted on only 6.2% of the land zoned for residential uses. If six aberrant rural municipalities are disregarded, the percentage falls to 1.1%.[7] In the South Jersey outer-ring counties,

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[7] The communities are Lamberton Township (Burlington); Winslow Township (Camden); Franklin Township (Gloucester); Plumstead Township (Ocean); Montague Township (Sussex); Allamuchy Township (Warren). All are distant from the path of development and rural in character.

2.7% of such land is zoned for multifamily housing; in the northern outer-ring counties, only ½ of 1% is so zoned. There is no land zoned for multifamily housing in Somerset County and only .006% is so zoned in Monmouth County.[8]

4) *Bedroom restrictions*

The effect of zoning against multifamily dwellings is magnified by restrictions upon the number of bedrooms which may be included in each dwelling unit. In the Department of Community Affairs study area[9] 59% of the already limited area of land zoned for multifamily dwellings is restricted to one-bedroom or efficiency apartments. On only 20.4% of this land is construction of apartments of three or more bedrooms permitted. In addition, in many areas where some construction of larger apartments is permitted, they are limited to a small percentage of any individual development. *The Residential Land Supply,*

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[8] It should be noted that despite these restrictions a significant amount of multifamily housing has been built in the suburbs in recent years. Thus, even in Somerset County, which had no vacant land zoned for multifamily dwellings during the period between 1960 and 1970, 7,635 multifamily units were built in those 10 years. This seems to have been achieved through variances and specially procured zoning ordinance amendments. Such individually negotiated variances and amendments, however, have usually been accompanied by formal or informal restrictions limiting development to small high-rent units, which are wholly unsuited to the needs of families with low or moderate incomes. *Nat'l. Comm. Against Discrimination in Housing, Jobs and Housing: Final Summary Report on the Housing Component, supra* at 35-37.

[9] Here, too, Winslow, Franklin, Plumstead, and Montague Townships are aberrant and not included.

supra at 11. In the North Jersey outer-ring counties, 78% of the land zoned for multifamily housing is burdened with bedroom restrictions. In the South Jersey outer-ring counties, 83% of the land zoned for multifamily housing is so restricted. The situation is particularly acute in Burlington County, where 95.8% of the land zoned for multifamily housing has bedroom restrictions.

The Department of Community Affairs concluded from these figures that:

> • • • [I]n general, the multi-family zoned land is geared to accommodate the housing needs of single people, married couples without children, and retired people, and not geared to the housing needs of the large part of the population living as families with children. [*The Residential Land Supply, supra* at 12; footnote omitted].

5) *Prohibition of mobile homes*

Mobile homes offer an alternate, less expensive form of housing. They have long since ceased to be mere "house trailers" but have become an important form of mass produced semi-permanent housing. Indeed, for many persons they may be the only form of new housing available. However, only .1% of the land zoned for residential use in the Department of Community Affairs study area was zoned for use by mobile homes. In the South Jersey outer-ring counties, .3% of the residential land was so zoned, the bulk of it being in Gloucester County, which had twice as much land zoned for mobile homes as the rest of the study area combined. None was zoned for this purpose in Cam-

den County. No land was zoned for mobile homes in the northern outer-ring counties.[10]

6) *Overzoning for nonresidential uses*

Zoning a great proportion of the developable land in a municipality noncumulatively for nonresidential uses may have the effect of forcing the price of land zoned for residential purposes up beyond the reach of persons with low or moderate incomes. Neither statewide nor countywide figures provide unambiguous evidence of the use of such practice at present in New Jersey. *Land Use Regulation, supra* at 6-8; *Sagalyn & Sternlieb, supra* at 96. At the municipal level, the use of such practices is more evident in some areas. Thus, in Mt. Laurel itself, 29.2% of the land in the township, totaling 4,121 acres, is zoned for industrial uses, although only 100 acres within the township has actually been developed for such use in the past 10 years, and there is no reasonable prospect of industrial uses expanding to such proportions.

If anything, these figures underestimate the extent of exclusionary zoning in this State. A wide variety of other techniques may be used to achieve an exclusionary effect. In addition, a municipality need not use all of these techniques to achieve exclusionary ends. Municipalities which have large lot-size and frontage requirements may not have building-size requirements and vice versa. Thus,

[10] In a few municipalities in Gloucester and Burlington Counties mobile homes are permitted in some nonresidential use areas. In a few localities scattered through the State, mobile homes are permitted as conditional uses. *The Residential Land Supply, supra* at 13; *Williams & Norman, supra* at 488-89.

only 18% of the land in the Department of Community Affairs study area zoned for single family residences permitted houses with less than 1,200 square feet of floor space to be constructed on a ¼ acre or less site with 100 foot or less frontage.

Forceful judicial intervention is necessitated not only by the already widespread use of exclusionary zoning practices and by the fact that the motivations for such are deeply ingrained in the suburban zoning and planning process, but also by certain extrinsic factors of which the Court may take notice.

First, the United States suffers from an acute national housing shortage. It has been estimated that over 10 million dwelling units would be needed to provide each family in the country with adequate housing. *Building the American City, supra* at 75. In New Jersey, it has been estimated that there is an immediate need for over 400,000 dwelling units. *Dep't of Community Affairs, The Housing Crisis in New Jersey,* 1970 (1970).[11] New Jersey, already the second most densely populated state in the country, is experiencing continuing population growth—it is estimated that by 1985 the total population will have increased from its 1970 figure of 7,200,000 to about 10,000,000. Special Message to the Legislature by Governor Cahill, *A Blueprint for Housing in New Jersey,* Dec. 7, 1970, at 1. Housing, particularly in urban areas, is deteriorating. The percentage of substandard units throughout the State increased from 14.8% in 1960 to 17.4% in 1969. In Hudson County, the increase was from 22.3% to 31.3%. *Housing Crisis in New Jersey, supra* at 14. Some of these units

[11] Hereinafter cited as *Housing Crisis in New Jersey.*

dropped out of the housing market altogether. It has been estimated that simply to keep up with population growth and to replace units which drop out of the housing market, 100,000 new units would have to be constructed in the State each year. Special Message to the Legislature by Governor Cahill, *A Blueprint for Housing in New Jersey,* Dec. 7, 1970, at 1. In fact, the construction of new housing in the State peaked in 1964, when permits were issued for the construction of 68,078 units, and has declined steadily since then. In 1970, permits were issued for construction of only 39,897 units. *Sagalyn & Sternlieb, Zoning & Housing Costs,* 98 (1972).

The brunt of this shortage is, of course, borne by persons with low or moderate incomes. As of 1970, it was estimated that not only were half of all low income families in the State obliged to live in inadequate housing, but so were approximately 125,000 families with moderate incomes. *Housing Crisis in New Jersey, supra* at iv. The median cost of a new single family detached house was $30,000 in the northeastern region of the country in 1969. *Sagalyn & Sternlieb, supra* at 20. Prices since then have risen precipitously. A study made in 1971 found median new house costs in suburban counties to range from $33,263 in Burlington to $62,500 in Somerset and $67,000 in Bergen. *Id.* at 22. Such housing was effectively beyond the reach of families with incomes of less than $15,000 per year. *Housing Crisis in New Jersey, supra* at 42. As of the time of that study, the median family income in New Jersey was $11,407 per year. Analyses by both the federal and state governments, *Building the American City, supra* at 93; *Housing Crisis in New Jersey, supra* at 40-43, indicate that the majority of families can afford to neither rent nor buy new housing at cur-

rent prices. Other authorities estimate that such housing may be beyond the financial capacity of as much as ¾ of all the families in the State, *Sagalyn & Sternlieb, supra* at 64, and as much as 90% of those families in which the head of the household is below the age of 35. *Nat'l Comm. Against Discrimination in Housing, Housing and Jobs: Final Summary Report on the Housing Component, supra* at 22. In theory, low and moderate income families should benefit even from construction of new housing which they themselves cannot afford because such housing creates vacancies which "filter down." In reality, however, most of these vacancies are absorbed by the enormous lag between population growth and new housing construction. *Sagalyn & Sternlieb, supra* at 42. The housing which does "filter down" to persons with low or moderate incomes is often badly dilapidated and in deteriorating neighborhoods. *Building the American City, supra* at 11; *Clawson, Suburban Land Conversion in the United States,* 330 (1970).

The existence of this housing shortage has been amply recognized by all branches of government in this State. *See, e. g., Inganamort* v. *Borough of Fort Lee,* 62 N. J. 521 (1973); *N. J. Mortgage Finance Agency* v. *McCrane,* 56 N. J. 414 (1970); *Marini* v. *Ireland,* 56 N. J. 130 (1970); *Mortgage Finance Agency Law,* N.J.S.A. 17:1B-5 (L. 1970, c. 35); *Department of Community Affairs Demonstration Grant Law,* N.J.S.A. 52:27D-61 (L. 1967, c. 82); Special Message to the Legislature by Governor Cahill, *A Blueprint for Housing in New Jersey,* Dec. 7, 1970; Special Message to the Legislature by Governor Cahill, *New Horizons in Housing,* Mar. 27, 1972.

Second, the growing movement of commerce and industry to the suburbs is imposing a heavy burden upon em-

ployees who are unable to obtain housing in these suburban areas. The trend, which began after World War II and has continued unabated, arises from a variety of causes—need for additional land for expansion, automated methods of handling goods which make single-floor layout of manufacturing plants economically desirable, increased access provided by superhighways, desire for aesthetic surroundings, lower suburban property taxes, etc. *See generally, Clawson, Suburban Land Conversion in the United States,* 40 (1971). Retail establishments have also relocated in the suburbs, taking advantage of the shift in the affluent population, the access provided by suburban highways, and the more attractive surroundings. *Id.* at 40-41. The result has been a shift of blue-collar jobs from the cities to the suburbs. *Id.* at 40. Thus in the New York metropolitan region,[12] 75% of the 990,000 news jobs created between 1959 and 1967 were located outside of New York City. Jobs at manufacturing production sites outside New York City increased during that period by 138,440, while such jobs within New York City diminished by 47,110. Of the 100,600 new jobs created in retailing between 1959 and 1965, 95% were located outside of New York City. The new jobs created within New York City in recent years have been confined almost exclusively to services, finance, insurance, communications, utilities, government and manufacturing headquarters offices, all of which are fields with high percentage of white-collar employment. It appears that these trends will continue into the foreseeable future. It has been estimated that between 1970 and 1985 New York City will lose another 137,700 factory jobs, and the suburbs gain 122,700. *Nat'l Comm. Against Discrimination in Housing, Jobs and Housing,* 6-9 (1970). Job movement in the Philadelphia metropolitan region displays an essentially identical pattern. *Nat'l Comm. Against Discrimination in Housing, Impact of Housing Patterns on Job Opportunities,* 21-26 (1968). This is, of course, the natural and foreseeable consequence of "fiscal zoning" that encourages the development within a municipality of commercial establishments, which are net tax-providers, and discourages the development of housing for persons who would work in such establishments, on the grounds that they are net revenue-absorbers.

[12] As the term is used by the Regional Planning Association, which includes much of northern New Jersey.

This trend is one that imposes unfair burdens on the worker who is locked out of suburban residential areas. For blue-collar workers, commutation from the cities to suburban job locations is both time-consuming and prohibitively expensive. There is often no access at all by public mass transit and even when such transporation is available in theory it is frequently impractical in fact. *Nat'l Comm. Against Discrimination in Housing, The Impact of Housing Patterns on Job Opportunities, supra* at 27-30; *Nat'l Comm. Against Discrimination in Housing, Jobs and Housing, supra* at 23-26. *See generally, Babcock and Bosselman, Exclusionary Zoning: Land Use Regulation in the 1970s,* 114-15 (1973).

Third, even as we write, development proceeeds apace. Once an area is developed, it becomes much more difficult to alter its social and economic character. There is a hazard that prolonged judicial inaction will permit exclusionary practices to continue to operate and will allow presently developing communities to acquire permanent exclusionary characteristics. The concern is not that New Jersey will soon be without developable land, but that

large areas now in the process of development will have already acquired irrevocably exclusionary characteristics before the courts effectively intervene. Thus, the Delaware Valley Regional Planning Commission has estimated that the amount of developed land in the Philadephia metropolitan area (including Burlington, Camden, Gloucester, and Mercer Counties) will increase by 38% between 1960 and 1985, *Clawson, supra* at 294, and the Regional Plan Association has estimated that intensive land use in the New York metropolitan area (which includes most of nothern New Jersey) will double in the same period, *Clawson, supra* at 279.

Finally, we must take notice of the fact that the cost of building new housing has increased steadily over the past 10 years and shows all signs of continuing to increase in the future. Between 1963 and 1969, the median sales price of new single-family housing in the northeastern part of the United States rose from $20,000 to $30,500. *Sagalyn & Sternlieb, supra* at 20. The costs of building rental housing had increased comparably. *See generally, Clawson, supra* at 82-83. As the costs of housing slip farther beyond the reach of persons of low and moderate incomes, the practical value of zoning reform diminishes and becomes increasingly contingent on the establishment of new State and federal housing subsidy programs.

Today's decision by its terms expressly concerns exclusionary zoning practices in municipalities which are developing but which "still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth." *Ante* at 160. As to these communities, the Court holds:

> • • • [E]very such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do. [*Ante* at 174; footnote omitted].

The majority has chosen not to explore in this case either the extent of the affirmative obligations upon developing municipalities or the role of the courts in enforcing those obligations. It has also chosen not to consider the degree to which the principles applicable to developing municipalities are also applicable to rural ones and to largely developed ones. The facts set out above seem to me to demonstrate that exclusionary zoning is a problem of such magnitude and depth as to require that the Court extend these principles to all municipalities in the State, recognizing, of course, that they may have different implications for municipal conduct when applied in different areas, and that the Court establish a policy of active judicial enforcement, not only of the negative obligations imposed upon municipalities by this decision but also of the affirmative obligations.

II

I consider first the extent of the affirmative obligation to plan and provide for housing opportunities for persons

with low and moderate incomes that municipalities assume when they choose to avail themselves of land use controls permitted by statute. Although this discussion will concern itself initially with developing municipalities, many of the same considerations also apply *mutatis mutandi* to developed municipalities and rural areas, as will subsequently become clear.

A municipality need not exercise at all the powers permitted it by the zoning and planning statutes, N.J.S.A. 40:55-30 *et seq.* and N.J.S.A. 40:55-1.1 *et seq.*[13] Once, however, it chooses to enter the field of land use regulation it assumes a duty—one of constitutional dimensions, deriving from *N. J. Const.* (1947), Art. I, § 1—to act affirmatively to provide its fair share of the low and moderate income housing necessary to meet the regional housing needs. *Cf. Southern Alameda Spanish Speaking Organization* v. *Union City,* 424 F. 2d 291, 295-6 (9 Cir. 1970); *Williams, American Planning Law: Land Use and the Police Power* §§ 66.15, 66.16 (1974).

The substantive content of this affirmative obligation will necessarily vary from municipality to municipality, depending upon, among other things, the intensity of the regional housing needs, the extent of previous exclusionary practices by the municipality, and the degree to which the municipality is benefiting, directly or indirectly, from regional economic development. A factor of special im-

[13] As of 1971, 96% of all municipalities in New Jersey had zoning ordinances and 85% had subdivision controls. *Sagalyn & Sternlieb, Zoning and Housing Costs* 102 (1972). We need not consider here the affirmative duties of a municipality which once had but has now abandoned zoning or subdivision regulations.

portance is the sufficiency of local housing opportunities for persons who might fill jobs created by new commercial and industrial development in the locality. *Cf. Building the American City, supra* at 243; ALI, *Model Land Development Code,* § 7-405 (Ten. Draft No. 3, 1971); *Babcock & Bosselman, Exclusionary Zoning: Land Use Regulation and Housing in the 1970s,* 114-15 (1973).

Every developing municipality has at least a duty to consider regional housing needs in all its planning activities, both formal and informal, including its formulation of the comprehensive plan underlying its zoning ordinance, N.J.S.A. 40:55-21, its adoption of a master plan, N.J.S.A. 40:55-1.10 and its consideration of applications for zoning variances, N.J.S.A. 40:55-39, and for approval of subdivision plats, N.J.S.A. 40:55-1.14.[14] In addition, since effective planning for regional needs is virtually impossible without some degree of intergovernmental cooperation, all developing municipalities also have an affirmative obligation to cooperate, where appropriate, in regional planning efforts, to cooperate, for example, with regional planning boards established pursuant to N.J.S.A. 40:27-9 and in area review procedures established under the Intergovernmental Cooperation Act, 42 U.S.C. 4231 and implemented by U. S. Office of Management and Budget Circular A-95 (July 24, 1969) and N.J.A.C. 5:42-1.1 *et seq. See generally Babcock & Bosselman, Exclusionary Zoning: Land Use Regulation and Housing in the 1970s,* 135-47 (1973).

[14] While this opinion is principally directed towards municipalities, the same considerations also apply to planning at the county level when the county has chosen to exercise power to regulate land use permitted it by N.J.S.A. 40:27-1 *et seq.*

Appendix A

There is little hope that the private housing construction industry will be able to satisfy the State's housing needs in the foreseeable future, even if all exclusionary barriers are removed. *Building the American City, supra* at 93. To meet these needs, State or federal assistance will be required. This fact has been recognized by both the State Legislature and Congress in a lengthy series of statutes providing governmental subsidies for private construction and ownership of low and moderate income housing. *See, e. g.,* Housing and Community Development Act of 1974, 88 Stat. 633 (codified at various places in 12, 42 U.S.C.); National Housing Act of 1959, § 202, as amended, 12 U.S.C. 1701q; National Housing Act, §§ 235, 236, as amended, 12 U.S.C. 1715z, 1715z-1 *et seq.;* Mortgage Finance Agency Law, N.J.S.A. 17:1B-4 *et seq.;* Housing Finance Agency Law, N.J.S.A. 55:14J-1 *set seq.;* Department of Community Affairs Demonstration Grant Act, N.J.S.A. 52:27D-59 *et seq.* To a greater or lesser degree, all of the programs require active municipal cooperation. Failure to actively cooperate in the implementation of such programs as effectively thwarts the meeting of regional needs for low and moderate income housing as does outright exclusion. *See, e. g., Farmworkers of Florida Housing Projects, Inc.* v. *Delray Beach,* 493 F. 2d 799 (5 Cir. 1974); *Kennedy Park Homes Ass'n* v. *Lackawanna,* 318 F. Supp. 669 (W. D. N. Y. 1970), aff'd 436 F. 2d 108 (2 Cir. 1970), *cert.* den. 401 U. S. 1010, 91 S. Ct. 1256, 28 L. Ed. 546 (1971). Developing municipalities have a duty to make all reasonable efforts to encourage and facilitate private efforts to take advantage of these programs.

Finally, there may be circumstances in which the municipality has an affirmative duty to provide housing for

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persons with low and moderate incomes through public construction, ownership, or management. *See, e. g.,* Community Development and Housing Act of 1974, Title II, 42 U.S.C. 1401 *et seq.;* Local Housing Authority Law, N.J.S.A. 55:14A-1; *cf. Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 355 F. Supp. 1257 (N. D. Ohio 1973) rev'd 500 F. 2d 1087 (6 Cir. 1974), *cert.* den. —— U. S. ——, 95 S. Ct. 781, 42 L. Ed. 2d 805 (1975).

There are certain important limitations on the scope of these affirmative obligations. While municipalities must plan and provide for regional housing needs, no municipality need assume responsibility for more than its fair share of these needs. The purpose of land use regulation is to create pleasant, well-balanced communities, not to recreate slums in new locations. It is beyond dispute that when the racial and socioeconomic composition of the population of a community shifts beyond a certain point, the white and affluent begin to abandon the community. While the attitudes underlying this "tipping" effect must not be catered to, the phenomenon must be recognized as a reality. *See, e. g., Graves* v. *Romney,* 502 F. 2d 1062 (8 Cir. 1974), *cert.* den. —— U. S. ——, 95 S. Ct. 1354, 43 L. Ed. 2d 440 (1975); *Otero* v. *New York City Housing Authority,* 484 F. 2d 1122 (2 Cir. 1973). Municipalities have a legitimate interest in placing an upper limit on the extent of uses which, if permitted to expand without limit, might reasonably be feared to operate to the general detriment. *Tidewater Oil Co.* v. *Carteret,* 84 N. J. Super. 525 (App. Div. 1965), aff'd 44 N. J. 338 (1965). The limitation of the municipality's affirmative duty to one of providing for its fair share of reasonable needs responds to this interest. *Cf. Mass. Gen. Laws Ann.,* c. 40B §§ 20-23 (a statute authorizing the state to override

local zoning restrictions for low and moderate income housing projects, but limiting the municipality's obligations to fixed annual and total maxima). A number of regions have, in response to the problem of exclusionary zoning, voluntarily sought to put such fair share housing plans into effect. *See Babcock & Bosselman, supra* at 109-13.

Nor need a municipality altogether give up control of the pace and sequence of development. A municipality has a legitimate interest in insuring that residential development proceeds in an orderly and planned fashion, that the burdens upon municipal services do not increase faster than the practical ability of the municipality to expand the capacity of those services, and that exceptional environmental and historical features are not simply concreted over. *See, e. g., Golden* v. *Ramapo Planning Board,* 30 N. Y. 2d 359, 334 N. Y. S. 2d 138, 285 N. E. 2d 291 (1972), appeal dismissed 409 U. S. 1003, 93 S. Ct. 436, 34 L. Ed. 2d 294 (1972); *Construction Industry Ass'n of Sonoma County* v. *Petaluma,* 375 F. Supp. 574 (N. D. Cal. 1974); Mass. Gen. Laws Ann., c. 40B, §§ 20, 23.[15] On the other hand, such regulations must be reasonable, substantially related to the purpose which they seek to achieve, and must adopt the least exclusionary means practical. "Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *National Land and Investment Co.* v. *Kohn,* 419 Pa. 504, 528, 215 A. 2d 597, 610 (Pa. Sup. Ct. 1965). By way of illustration, large lot

[15] It should be emphasized that citation of these cases and statutes is not intended to indicate approval of the specific zoning provisions approved therein.

zoning is commonly rationalized as a device for preventing premature development. Such zoning, it is claimed, merely creates holding zones. In practice, however, it appears that land zoned for large lots, even where intended as an interim holding zone, tends to become frozen in a pattern of low density development. *Williams & Norman, supra* at 495. Such zoning is not a reasonable device for regulating the pace and sequence of development. Its effects on development, if any, are merely exclusionary.

Finally, the affirmative duty to plan and provide for regional needs does not require the municipality to make any specific piece of property available for low or moderate income housing, absent a showing that there are inadequate alternative sites realistically available for that type of development. A municipality must zone in accordance with a comprehensive plan. N.J.S.A. 40:55-32. Once it has adopted a comprehensive plan which properly provides for the community's fair share of the regional housing needs, it is entitled to be able to enforce that plan through its zoning ordinances. To permit a developer to come in at a later date and demand, as a matter of right, that a piece of property not presently zoned to permit development of low or moderate cost housing be so zoned, is to undermine the entire premise of land use regulations. *Williams, supra* at § 66.15; *see Confederation de la Raza Unida* v. *Morgan Hill,* 324 F. Supp. 895 (N. D. Cal. 1971). The one exception to this principle is the situation in which the developer can show that, as a matter of practical fact, sufficient land is not available for development in the areas zoned for low or moderate income housing. *See, e. g., Kennedy Park Homes Association* v. *Lackawanna,* 318 F. Supp. 669 (W. D. N. Y.

1970), aff'd 436 F. 2d 108 (2 Cir. 1970), *cert.* den. 401 U. S. 1010, 91 S. Ct. 1256, 28 L. Ed. 2d 546 (1971) (construction of multi-family housing in area zoned for it would perpetuate a segregated housing pattern and add to existing problem of overcrowding); *Pascack Ass'n* v. *Washington Tp.*, 131 N. J. Super. 195 (Law Div. 1974) (area zoned for multi-family housing was already largely occupied by other, non-residential uses, and was burdened with other zoning requirements that made construction of low or moderate income housing impractical).

The affirmative obligations of developing municipalities so far discussed are legally binding and judicially enforceable. It is a truism that courts have no inherent expertise in matters of land use planning. They are not equipped to sit as higher planning boards and substitute their judgment for municipal bodies lawfully established for the purpose of making planning and zoning decisions. *Bow & Arrow Manor* v. *West Orange*, 63 N. J. 335, 343 (1973); *Kozesnik* v. *Montgomery Tp.*, 24 N. J. 154, 167 (1957). The decision as to how the municipality should go about performing the affirmative duties set out above is one initially to be made by the officials of the municipality itself. Nevertheless, if the municipality has failed to take affirmative steps to make realistically possible a variety and choice of housing so as to meet its fair share of the regional housing needs, its actions are presumptively illegal and the burden shifts to the municipality to justify them. The mere fact that local land use control issues are involved does not preclude the court from making such determinations, nor, if a court finds that the municipality has failed to meet its obligation, from exercising the full panoply of equitable powers to remedy the situation. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (2 Cir. 1968); *Hawkins* v. *Shaw*, 437 F. 2d 1286 (5 Cir. 1971);

Pascack Ass'n v. *Washington Tp.*, 131 N. J. Super. 195 (Law Div. 1974).

Judicial enforcement of municipal obligations, both negative and affirmative, to plan and provide for a fair share of regional housing needs, even if only directed to one municipality, necessarily has grave implications for the entire region. In dealing with such cases courts must act both deliberately and imaginatively. In administering such relief the trial court ought to proceed in four steps:

(1) identify the relevant region;[16]

(2) determine the present and future housing needs of the region;

(3) allocate these needs among the various municipalities in the region;[17] and

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[16] Relevant considerations might include: the area included in the interdependent residential housing market; the area encompassed by significant patterns of commutation; the area served by major public services and facilities, *e. g.*, parks, hospitals, cultural facilities, etc.; the area in which the housing problem can be solved. All of these considerations must be evaluated in terms of both present facts and projections of future development.

[17] The following factors were considered in developing a fair share plan for the Dayton, Ohio area:

> [T]he needed low and moderate income dwelling units were assigned to the planning units using a composite of numbers resulting from six calculation methods: (1) equal share; (2) proportionate share of the county's households; (3) proportionate share of the county's households making less than $10,000 annually (or less than $7,000 in the

(Footnote continued on following page)

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(4) shape a suitable remedial order.

Cf. Williams, American Planning Law: *Land Use and the Police Power* § 66.38 (1974). Needless to say, all of these steps involve difficult factual determinations based upon expert testimony and statistical evidence. It may well be appropriate for the court to appoint independent experts or consultants for its assistance, *see Pascack Ass'n* v. *Washington Tp.*, 131 N. J. Super. 195 (Law Div. 1974); *cf. Handleman* v. *Marwen Stores Corp.*, 53 N. J. 404 (1969); *Polulich* v. *J. G. Schmidt Tool Die & Stamping Co.*, 46 N. J. Super. 135 (Cty. Ct. 1957); *Manual for Complex Litigation*, Pt. 1 §§ 1.42, 1.46, 2.60, 3.40 (1973), or to invite participation by the Department of Community Affairs as *amicus curiae*.

(Footnote continued from preceding page)

three more rural counties); (4) the inverse of #3; (5) a share based on the assessed valuation per pupil of the school districts covering the planning units; and (6) a share based on the relative over-crowding of the school districts involved.

• • •

The six factors used in the calculations, however, seemed to reflect some very basic determinations: the possibility of each sub-area being treated equally, the existing distribution of each county's households and lower income households, and two indicators of the receiving school districts' ability to accept new students. The latter two were used because the school question emerged as a critical concern whenever low and moderate income housing was mentioned for placement in a given area.

[Bertsch & Shafer "A Regional Housing Plan: The Miami Valley Regional Planning Commission Experience," 1 *Planners Notebook* No. 1 (1971) quoted in *Williams, supra*, § 66.36.]

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Since conflicting decisions within a given region would be highly undesirable, all municipalities in the region should be joined as parties at the earliest practical point in the proceedings, if not at the instance of one of the parties, then on the motion of the court. *R.* 4:28-1, 4:30.

The trial court must be flexible and imaginative in molding remedies to fit the facts of each case, balancing the need to vindicate the rights of persons who have been or will be deprived of the opportunity for decent housing if no relief is granted against the principle of local decision-making in land use planning matters. *Pascack Ass'n* v. *Washington Tp., supra; see e. g., Kennedy Park Homes Ass'n* v. *Lackawanna*, 318 F. Supp. 669 (W. D. N. Y. 1970) aff'd 436 F. 2d 108 (2 Cir. 1970) *cert.* den. 401 U. S. 1010, 91 S. Ct. 1256, 28 L. Ed. 2d 546 (1971); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N. D. Ohio 1973) rev'd on other grounds, 500 F. 2d 1087 (6 Cir. 1974), *cert.* denied —— U. S. ——, 95 S. Ct. 781, 42 L. Ed. 2d 805 (1975); *United Farmworkers of Florida Housing Projects, Inc.* v. *Delray Beach*, 493 F. 2d 799 (5 Cir. 1974); *Lakewood Homes, Inc.* v. *Lima Bd. of Adjustment*, 23 Ohio Misc. 211, 52 Ohio Op. 2d 213, 258 N. E. 2d 470 (Ohio Ct. C. P. 1970); mod. 25 Ohio App. 2d 125, 267 N. E. 2d 595 (Ohio Ct. App. 1971).

III

It can hardly be denied that there are some suburban municipalities which have already developed in an exclusionary mold. These communities, which have benefited from regional development, have, by their land use controls, contributed to the regional housing shortages. *Cf. United States* v. *Black Jack*, 372 F. Supp. 319 (E. D. Mo. 1974).

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It would be both highly inequitable to absolve them of any responsibility for solving those problems and inconsistent with the legal analysis developed by the Court today. Although the majority does not reach this issue in the present case, I would hold that developed suburban municipalities which have availed themselves of the land use controls permitted by statute and which have not provided sufficient opportunities for development of low and moderate income housing to meet their fair share of regional needs, have both a negative obligation not to use zoning and subdivision controls to obstruct the construction of such housing and an affirmative duty to plan and provide for such housing, insofar as these obligations can be carried out without grossly disturbing existing neighborhoods. It is, of course, neither practical nor wise to demand that such communities completely rezone established neighborhoods; to do so would in all likelihood contribute to neighborhood instability and permit certain property owners and developers to obtain windfalls rather than actually effecting construction of low or moderate income housing.

Occasions, however, arise in every community when land becomes available for development or redevelopment. It is on these occasions that these obligations come into play most strongly. Thus the existence of an unmet regional need for low and moderate income housing in appropriate cases must be given great weight in considering applications for variances under N.J.S.A. 40:55-39(d) to permit the construction of such housing. *De Simone* v. *Greater Englewood Housing Corp. No. 1,* 56 N. J. 428 (1970); *Brunetti* v. *Madison Tp.,* 130 N. J. Super. 164 (Law Div. 1974).

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The discussion above of judicial enforcement applies equally to developed suburban communities, save only that in formulating relief the trial judge must be alert to take into consideration the delicacy and difficulty of altering the character of already developed areas.

IV

Substantial portions of New Jersey are neither experiencing a surge of development nor situated in the imminently foreseeable path of development. These include much of Cape May, Cumberland, and Salem Counties, portions of Atlantic, Ocean, Sussex and Warren Counties, and some rural areas in other parts of the State. In these municipalities, it is not meaningful to speak of failure to meet regional housing needs, not because there are no persons who are inadequately housed,[18] but because it is not yet meaningful to speak of "regional" needs nor is it clear that land use controls play a significant role in the housing shortage at the present time. Nevertheless, the time may well come when the frontiers of suburbia will reach these areas. Municipalities may not act to deter the future development of a diversified housing stock by establishing land use controls which are inherently exclusionary and which bear no substantial relationship to any legitimate zoning purpose.

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[18] In 1970 the Department of Community Affairs, in its study, *Housing Crisis in New Jersey 1970,* reported that 13.9% of the dwelling units in Cape May County were substandard, 32.8% in Cumberland, 34.7% in Salem, 16.9% in Atlantic, 19.5% in Sussex, and 23.2% in Warren. All of the counties have significant populations near or below the poverty level. *Id.*

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Without purporting to exhaust the list of zoning devices which are presumptively objectionable, I would note that minimum house size requirements which bear no substantial relationship to health needs[19] and requirements as to the minimum or maximum number of bedrooms which a dwelling unit may contain, *cf. Molino* v. *Glassboro,* 116 N. J. Super. 195 (Law Div. 1971), are presumptively invalid. *Zoning* for excessively large lots and large frontages presents more difficult analytic problems, *cf. Steel Hill Development, Inc.* v. *Sanbornton,* 469 F. 2d 956 (1 Cir. 1972), but excessive mapping for such lots is, absent extraordinary environmental factors, also presumptively invalid. *Cf. Williams & Norman, supra* at 496-97.

These obligations, too, are judicially enforceable, albeit without need for the more elaborate procedures appropriate for litigation concerning developing and developed areas which are discussed above.

V

The problems we begin to face today are of awesome magnitude and importance, both for New Jersey and for the nation as a whole. It will not do to approach them gingerly; they call out for forceful and decisive judicial action.

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[19] Unjustifiable minimum house size requirements should, of course, be distinguished from housing code minimum space requirements which bear a real and substantial relationship to health needs. *Sente* v. *Clifton,* 66 N. J. 204, 209 (1974) (Pashman J. dissenting); *Building the American City, supra* at 215 n. 19.

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The flow of low and moderate income persons is toward urban areas, but the cities have neither the space nor the resources to house these people. The question is whether the suburbs will act to accommodate this growth in an orderly way or will simply and blindly resist. Two well-entrenched zoning objectives, low density land use and favorable fiscal balance, though sometimes at odds with each other, have on the whole cooperated to create a milieu of discriminatory zoning which threatens to make the next 30 years of suburban growth a disaster.

The shape of the possible disaster can now be foreseen. The inevitable alternative to assumption by suburban communities of an obligation to provide for their fair share of regional housing needs is an increase in the size of slums with all their attendant miseries. The consequences of such economic, social, and racial segregation are too familiar to need recital here. *See Nat'l Advisory Comm'n on Civil Disorders, Report* (1968). Justice must be blind to both race and income.

It is not the business of this Court or any member of it to instruct the municipalities of the State of New Jersey on the good life. Nevertheless, I cannot help but note that many suburban communities have accepted at face value the traditional canard whispered by the "blockbuster": "When low income families move into your neighborhood, it will cease being a decent place to live." But as there is no difference between the love of low income mothers and fathers and those of high income for their children, so there is no difference between the desire for a decent community felt by one group and that felt by the other. Many low income families have learned from necessity the desirability of community involvement and improvement. At least as well as persons with higher

incomes, they have learned that one cannot simply leave the fate of the community in the hands of the government, that things do not run themselves, but simply run down.

Equally important, many suburban communities have failed to learn the lesson of cultural pluralism. A homogeneous community, one exhibiting almost total similarities of taste, habit, custom and behavior is culturally dead, aside from being downright boring. New and different life styles, habits and customs are the lifeblood of America. They are its strength, its growth force. Just as diversity strengthens and enriches the country as a whole, so will it strengthen and enrich a suburban community. Like animal species that over-specialize and breed out diversity and so perish in the course of evolution, communities, too, need racial cultural, social and economic diversity to cope with our rapidly changing times.

Finally, many suburban communities have failed to recognize to whom the environment actually belongs. By environment, I mean not just land or housing, but air and water, flowers and green trees. There is a real sense in which clean air belongs to everyone, a sense in which green trees and flowers are everyone's right to see and smell. The right to enjoy these is connected to a citizen's right to life, to pursue his own happiness as he sees fit provided his pursuit does not infringe another's rights.

The people of New Jersey should welcome the result reached by the Court in this case, not merely because it is required by our laws, but, more fundamentally, because the result is right and true to the highest American ideals.

MOUNTAIN and PASHMAN, JJ., concurring in the result.

For modification—Chief Justice HUGHES and Justices JACOBS, HALL, MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD—7.

Opposed—None.

APPENDIX B

Opinion of the Superior Court of New Jersey, Law Division

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

DOCKET NO. L-25741-70PW

119 N. J. Super. 164 (Law Div. 1972)

SOUTHERN BURLINGTON COUNTY N.A.A.C.P.; CAMDEN COUNTY C.O.R.E.; CAMDEN COUNTY N.A.A.C.P.; ETHEL LAWRENCE; THOMASINE LAWRENCE; CATHERINE STILL; MARY E. SMITH; SHIRLEY MORRIS; JACQUELINE CUSTIS; GLADYS CLARK; BETTY WEAL and ANGEL PEREZ; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TOWNSHIP OF MOUNT LAUREL, New Jersey, its officials, employees and agents; PLANNING BOARD OF MOUNT LAUREL TOWNSHIP; ZONING BOARD OF MOUNT LAUREL TOWNSHIP; JIRAIR S. HOVNANIAN; "JOHN DOE" a partnership (a fictitious name representing that partnership which is the owner and developer of the Cross Keys Planned Unit Development, Mount Laurel, New Jersey); HANNAH ROSING; MICHAEL LUBIN; GOODWIN BROTHERS, INC.; CG ASSOCIATES; GOODWIN HOMES, INC.,

Defendants.

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Decided May 1, 1972

MARTINO, A. J. S. C. Plaintiff's [*sic*] herein consist of corporate entities and certain individuals, resident and non-resident, who seek declaratory and injunctive relief against a municipality's zoning ordinance. The right of the corporate entities to bring the action raises a question of qualification to do so, but since certain individual plaintiffs are township residents their right to sue will permit the court to dispose of the issue raised without a determination of the right to sue raised against the other plaintiffs.

The factual situation as it appears as to the resident plaintiffs clearly indicates one of them has moved into a house which was originally used as a summer quarters for a summer camp. The electrical wiring is in an exposed condition and she often gets shocks from the outlets; one space heater by the front door provides inadequate intermittent heat and she must use the gas stove to provide sufficient heat; cold air comes through the windows; drains do not work on occasion and the cesspool backs up into the toilet. She was told that the county board of health and the local building inspector want to be advised when she leaves so that they can "post" the house as unfit for human habitation. She has two children, ages four and two, and receives $282 a month from the Welfare Department. In 1969 the planning board of defendant township recommended blighted area treatment for the area in which she lives.

Another resident with two children and two grandchildren, a widow, lives in an area also recommended for blighted area treatment by the planning board. The dwelling in which she lives was the subject of the first

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receivership action brought in this State under the new Receivership Law—N.J.S.A. 2A:42-85 et seq. For five years she and her family had been living in the house without any indoor plumbing or hot or cold running water. As a result of the court proceedings the house was put in receivership and repairs ordered. As a result her toilet is now functional and she has hot and cold running water. However, insufficient funds are available to repair a leaking roof, plaster continues to fall, the stove is broken, pipes leak in bathroom, the house is infected with vermin. She has attempted to find other quarters in Mount Laurel, but is unable to do so because of her present income. Her total annual income is $6,000.

Another plaintiff has lived with her husband and seven children in defendant township for 20 years. The house is old and crowded and the area is surrounded by industrial uses. She was unable to give the age of the building, although she has lived in it 20 years.

Defendant township stipulated that three other persons who are party plaintiffs were former residents of Mount Laurel but were forced to move to adjoining municipalities. One couple had been living in a converted chicken coop; the cesspool kept backing up and the quarters were infected with vermin. This couple was forced to move in 1970. Another plaintiff was born in defendant township but was forced to move to Camden. The family had lived in a structure in Mount Laurel called "Diamond Apts." Their quarters were heated by a single kerosene heater; there was little or no hot water; the cesspool backed up and the place was infected with vermin. The family consisted of a husband and wife and four children. Another plaintiff, separated from her husband, was forced to move to Camden because the house she and her four chil-

dren lived in while a resident of Mount Laurel had ceilings that were cracked and opened. A coal furnace with air vents on the first floor heated the entire house. Water lines continually became frozen; the cesspool kept filling up and backing up.

Testimony has indicated that in defendant municipality the minimum building costs of a single-family home is approximately $23,000. This would be the cost of the home completely bare, built on nonunion wages. Testimony further revealed that such a home built at union wage and including minimal amenities would cost 10% to 20% more. This would result in an expense for a single-family home that would not qualify for federal subsidized programs within the reach of the resident plaintiffs herein neglected. Over the years defendant municipality has acted affirmatively to control development and to attract a selective type of growth. These plans were financed with state and federal funds. The township has consistently excluded trailers or mobile homes from its confines. Multi-family uses were generally prohibited as early as 1954 in the local ordinances and the amendments which followed.

While plaintiffs' testimony referred to clearly indicates the neglect of defendant municipality as to them, the suit by these individuals who appear of record is proposed as a class action for the benefit of many others who, it is alleged and not disputed, suffer from the same substandard type of housing accommodations and reside in defendant municipality.

Under certain factual circumstances our Supreme Court has upheld zoning ordinances which require minimum interior floor space, *Lionshead Lake Inc.* v. *Wayne Tp.*, 10 N. J. 165 (1952), app. dism. 344 U. S. 919, 73 S. Ct. 386, 97 L. Ed. 708 (1953); which limit lot sizes for a single-family unit to five acres, *Fischer* v. *Bedminster Tp.*, 11 N. J. 194 (1952); which absolutely prohibit the construction of any additional multi-family units, *Fanale* v. *Hasbrouck Heights*, 26 N. J. 320 (1958); which prohibit the use of mobile homes on an individual lot, *Napierkowski* v. *Gloucester Tp.*, 29 N. J. 481 (1959), and which absolutely prohibit all mobile-home parks from a township, *Vickers* v. *Gloucester Tp. Committee*, 37 N. J. 232 (1962), *cert.* den. 371 U. S. 233, 83 S. Ct. 326, 9 L. Ed 2d 495 (1963).

Plaintiffs do not quarrel with the above-mentioned cases and for the purpose of argument herein are not suggesting that they be overruled. They maintain that, if anything, these cases clearly enumerate judicial standards which mandate that they prevail in the instant case. Following the *Lionshead* case, which will be discussed *infra*, our court in *Pierro* v. *Baxendale*, 20 N. J. 17 (1955), aptly noted:

> We are aware of the extensive academic discussion following the decisions in the *Lionshead* and *Bedminster* cases, *supra*, and the suggestion that the very broad principles which they embody may intensify dangers of economic segregation * * *. In the light of existing population and land conditions within our State these powers may *fairly* be exercised without in anywise endangering the *needs* or *reasonable expectations* of any segments of our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and *judicial* attitudes need not be long delayed [at 29; emphasis added]

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In defendant township multi-family dwellings are only permitted on a farm for a farmer, a member of the farmer's family, or persons employed by the farmer, provided the multiple-family dwelling is not closer than 200 feet from the property boundary line.

Minutes of various township committee meetings expressing the attitudes of the members of the governing body were introduced into evidence. Early in 1968 the mayor, when a discussion arose as to low-income housing, stated it was the intention of the township committee to take care of the people of Mount Laurel Township but not make any area of Mount Laurel a home for the county. A committeeman added that it was the intent of the township to clear out substandard housing in the area and thereby get better citizens. At a later meeting of the township committee in 1969 a variance to permit multi-family dwelling units was rejected because the committee did not see a need for such construction. At a meeting in 1970 a committeeman, during a discussion of homes being run down and worthless, indicated that the policy was to wait until these homes were vacant before the township took action, "because if these people are put out on the streets they do not have another place to go." At another meeting in September 1970 a township committeeman, when referring to pressure from the Federal and State Governments to encourage low-cost housing, retorted that their most useful function was to evaluate and screen away all but the most beneficial plans. He added, "We must be selective as possible—approving only those applications which are sound in all respects—We can approve only those development plans which will provide direct and substantial benefits to our *taxpayers*." (Emphasis added) All through the various admissions

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permitted to be introduced into evidence, the evidence clearly indicates the attitude of developers who proposed various developments which were not concerned with people of low incomes. Every proposal made leaned in the direction of homes for only those of high income.

A research specialist and planning attorney, who was a consultant to the Division of State and Regional Planning, Department of Community Affairs, and a reporter to the State Land Use Revision Commission charged with revising the State's enabling legislation regarding planning and zoning in New Jersey, as well as counsel to Governor Cahill's Housing Task Force Committee, called by defendant municipality as one of its experts categorically stated that the lack of permissible multi-family provisions in the zoning ordinance was a very good indication that low-income families were not being provided for. While he indicated that Burlington County, as a part of the Camden region, had a possiblity of 45,000 multiple-family units under existing ordinances, it must be conceded that under our present enabling statute each municipality now controls its own zoning destiny.

Another expert witness employed by defendant municipality indicated that 66% of the township is vacant land. In the R-1 zone, which is the district having the lowest zoning category, viz., 9,375 square feet, there is currently 928 acres of vacant land available for development. This witness, a planner for defendant township for the past 2½ years, conceded that nothing to his knowledge has been done to re-house the residents living in substandard dwellings in that community. He also conceded that he knew of no standard housing in defendant township available for residents on welfare; that people are living in substandard housing because the municipality will not

condemn, inasmuch as our Relocation Law, N.J.S.A. 20:4-1 to 22, would require that these residents be otherwise located.

The effect of this practice would account for the photographic exhibits, which indicate the deplorable facilities now tenanted by residents of the township.

In *James* v. *Valtierra,* 402 U. S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971), involving a California constitutional provision which required that all public housing proposals be submitted to a referendum, the court upheld the right to referendum. However, the reason was that the referendum itself did not on its face socially discriminate. In *Hunter* v. *Erickson,* 393 U. S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969), the same court invalidated a city charter which required all fair housing ordinances to be submitted to a referendum.

"The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws." *Douglas* v. *California,* 372 U. S. 353, 361, 83 S. Ct. 814, 818, 819, 9 L. Ed. 2d 811 (1963), cited by Justice Marshall, with Justice Brennan and Justice Blackman concurring, in the dissent in *James* v. *Valtierra, supra.* Significantly, the dissent added that "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."

Very little weight should be placed on the majority opinion in *James* v. *Valtierra, supra,* as an argument on behalf of defendant municipality, because the court there

said, "Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle."

In *Southern Alameda Spanish Speaking Organization* v. *City of Union,* 424 F. 2d 291 (9 Cir. 1970), the court, while only passing on the right to referendum as in *James* v. *Valtierra, supra,* significantly stated:

> Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups. [at 295-296]

In *Hobson* v. *Hansen,* 269 F. Supp. 401 (D. C. 1967) aff'd *sub nom. Smuck* v. *Hobson,* 132 U. S. App. D. C. 372, 408 F. 2d 175 (1969) (*en banc*), the trial court stated:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary

> quality of thoughtlessness can be as disastrous to private rights and the public interest as the perversity of a willful scheme. [at 497]

One of the earlier cases which appeared to follow the philosphy propounded by these plaintiffs was *Brookdale Homes, Inc.* v. *Johnson,* 123 N. J. L. 602 (Sup. Ct. 1940), aff'd 126 N. J. L. 516 (E. & A. 1941). In that case an ordinance required a dwelling to be not less than 26 feet above the building foundation. The court held:

> • • • [A]n ordinance under the zoning act must bear a reasonable relation to the powers conferred by that act. • • • Restrictions imposed pursuant to the zoning act must tend at least in some degree to promote the public good; they must bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.

It appears that plaintiff there sought the right to build a dwelling which would be only 21 feet high from its foundation. The Court of Errors and Appeals filed a dissenting opinion joined in by six jurists.

Twelve years later *Lionshead Lake, Inc.* v. *Wayne Tp., supra,* was decided. That case has been the subject of much academic discussion. "Wayne Township: Zoning for Whom—In Brief Reply," 67 *Harv. L. Rev.* 986 (1954); Harr, "Zoning for Minimum Standards, The Wayne Township Case," 66 *Harv. L. Rev.* 1051 (1953). Chief Justice Vanderbilt concluded that constitutional and statutory changes in the meantime had in effect adopted the reasoning of the dissenters in *Brookdale, supra,* and rendered inapplicable the majority decision of the Court of

Errors and Appeals which had held invalid an ordinance imposing minimum restrictions on the size of dwellings to protect the character of a community and property values therein. However, the opinion did include the statement:

> We must bear in mind, finally, that a zoning ordinance is not like the law of the Medes and Persians; variances may be permitted, the zoning ordinance may be amended, and *if the ordinance proves unreasonable in operation it may be set aside at any time.* [10 N. J. at 172, 173; emphasis added]

A dissenting opinion by the late Justice Oliphant, who was joined by the late Justice Wachenfeld, commented upon the very points raised by plaintiffs in the instant case, i. e.,

> Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case. They will be relegated to living in the large cities or in multiple-family dwellings even though it be against what they consider the welfare of their immediate families. [at 182]

Nineteen years later *University of Toledo Law Review,* vol. I, No. 1 (Winter 1969), at 76, had occasion to state, "Justice Oliphant's dissent in *Lionshead* is eloquent testimony to his farsightedness."

Today there remains only one jurist on our Supreme Court who concurred with the majority in *Lionshead, supra.*

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[I]n zoning there must be a rational relation between the regulation and the promotion of the general welfare within the reach of the statutorily prescribed areas of action, and that the means invoked be in keeping with the public need. Arbitrary deviation from the general rule is forbidden; and, by the same token, undue discrimination in treatment and classification vitiates the regulation. [*Roselle* v. *Wright,* 21 N. J. 400, 410 (1956).]

The thin dividing line between economic segregation and racial or ethnic segregation can be seen in two New Jersey cases. It is generally assumed that it would be unconstitutional for the government by enactment and administration of local zoning ordinances to segregate residential areas by income levels, for example, by restricting an area to those families with incomes over $10,000. or to homes costing $20,000. In *Stein* v. *Long Branch* (2 N. J. Misc. 121 (Sup. Ct. 1924)) and *Brookdale Homes, Inc.* v. *Johnson,* (*supra*), (overruled in *Lionshead, supra*), the zoning ordinances provided that no residences should cost less than a certain amount. The provisions of these ordinances clearly intended to exclude those unable to afford the houses in question. [*University of Toledo Law Review, supra,* at 75]

Ten years ago Justice Hall, in his dissent in *Vickers* v. *Gloucester Tp. Committee, supra,* in a lengthy dissent which deserves close study, summed up the true function of zoning when he said:

> In my opinion legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to leave [*sic*] in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendancy and *courts must not be hesitant to strike down purely selfish and undemocratic enactments.* [37 N. J. at 264, 265; emphasis added]

Appendix B

While a municipality can be said to permit a use not specifically permitted in a zoned area by way of a variance, the Governor's message delivered March 27, 1972 clearly enunciated the long and tortuous delays in accomplishing any variant to the provisions of our present zoning ordinances, much to the frustration of and damage to the builder and ultimate owner. See "*New Horizons in Housing,*" *A Special Message by William T. Cahill, Governor of New Jersey.* The message, ever mindful of the rights of the individual to live, and let live, calls for a rejuvenation of the general welfare concept originally contemplated in zoning and planning. The message and the proposals it suggests may put to rest the problem that exists as to the poor and needy in the sphere of housing. The courts, however, must be ever watchful of any discriminatory acts of local units of government against the rights and privileges of the poor and underprivileged.

[1] It must be conceded that there is a general principle against judicial inquiry into the exercise by a legislative

body of its police powers. Courts have always had the power to scrutinize the issue of discrimination. The pleadings, the evidence and the issues framed in this action evoke judicial review beyond that posed by a generalized exercise of police power. The inquiry here was not limited to the terms of the ordinance; the court received evidence of the ordinance's purpose, its ultimate objective and all the circumstances attending its adoption and enforcement.

The problems which zoning has raised were nurtured by the decision of our United States Supreme Court in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Those who oppose multi-family dwelling units find solace in the words of the late Justice Sutherland, who described multiple-family dwellings as very often a mere parasite whose presence utterly destroys the residential character of the neighborhood and its desirability as a place of residence. While the *Euclid* decision may have in effect condoned legislative zoning discretion, it did warn that:

> It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way. [272 U. S. at 390, 47 S. Ct. at 119, 71 L. Ed. at 311]

The *Euclid* case in the lower court plainly indicated the exclusionary use of zoning that was being perpetrated. That court said:

> The plain truth is that the true object of the ordinance in question is to place all property • • • in a strait-jacket. The purpose to be accomplished

> is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. [297 F. 307, 316 (N. D. Ohio 1924), rev'd 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)]

[2] Today, when municipalities give reasons for the exclusion of certain uses, although they gloss them with high-meaning phrases, they lack sincerity. It is not low-cost housing which ferments crime; it is the lower economic strata of society which moves in, yet no ordinance would dare to raise that objection to prohibit them and expect to succeed. Local legislative bodies know better than to state that more low-income producing structures will mean a higher tax rate. This is what the courts have abhorred as fiscal zoning. What local governing body would raise an objection to bringing a factory into a neighborhood because it would increase the population of the economically poor? While it may be an argument that it would affect property values, and while it is proper to zone in certain instances against factories, it is improper to build a wall against the poor-income people. In *Gomillion* v. *Lightfoot,* 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), the court made it clear that the Constitution nullifies sophisticated as well as simple-minded modes of discrimination.

In *Duffcon Concrete Products* v. *Cresskill,* 1 N. J. 509, 513 (1949), the court gave some promise when it said:

> What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing

> within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. [at 513]

The judiciary cannot be expected to alleviate a condition that definitely calls for legislative action from either the national or state governments. The courts can only meet each specific situation as it is presented, and while one community may have facts which justify court intervention, the relief will not necessarily be the same in all areas unless the factual content justifies intervention, as this court believes in the case at hand. The Federal Government has left zoning problems to the states, and the states have largely, but not entirely, left them to the local governments. Housing, to be adequate for the poor, must be left primarily in the hands of a governmental body other than a local unit. The judiciary can only expect to give relief on a piecemeal basis, and "legislation" by the courts is often less than satisfactory.

Ever mindful of the admonitions set forth in the Constitutional mandate of the *New Jersey Constitution,* Art. IV, § VII, par. 11, enjoining liberal construction of provisions in that document and of laws concerning local government, I would parrot the words of Justice Hall in his dissent in

Vickers, supra, 37 N. J. at 257, when he said, "Analysis demonstrates that the mandate has no true application in this situation."

There has been too much conservatism in the definition of the words which refer to one of the purposes of zoning, *i. e.* "to promote the general welfare." Some definitions would better apply to private welfare.

Our present State Supreme Court, in a different setting, said:

> We specifically hold, as matter of law in the light of public policy and the law of the land, that public or, as here, semi-public housing accommodations to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason adequate to meet that requirement of N.J.S.A. 40:55-39(d) and to ground a use variance. [*DeSimone* v. *Greater Englewood Housing Corp. No. 1,* 56 N. J. 428, 442 (1970)]

[3] The patterns and practice clearly indicate that defendant municipality through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons. The zoning ordinance is, therefore, declared invalid.

Plaintiffs, in seeking declaratory and injunctive relief, argue that even if the zoning ordinance were declared in-

valid, the injury they suffer will not afford a remedy. They argue there is a desperate need for affirmative municipal action within parameters established by the court.

In *Hawkins* v. *Shaw,* 437 F. 2d 1286, 1293 (5 Cir. 1971), the court declared that a municipality cannot discriminate in the use of municipal services and said that a town could be required to submit a plan for the equitable distribution of such services. See also, *Crow* v. *Brown,* 332 F. Supp. 382 (N. D. Ga. 1971), aff'd 457 F. 2d 788 (5 Cir. 1972).

[4] This court agrees with plaintiffs and, therefore, orders that defendant municipality shall, upon the entry of a judgment to conform with these findings and conclusions of law, immediately undertake a study to identify:

a. The existing sub-standard dwelling units in the township and the number of individuals and families, by income and size, who would be displaced by an effective code-enforcement program;

b. The housing needs for persons of low and moderate income:

   1. Residing in the township;

   2. Presently employed by the municipality or in commercial and industrial uses in the township;

   3. Expected or projected to be employed by the municipality or in commercial and industrial uses, the development of which can reasonably be anticipated in the township.

Defendant shall, upon completion of the investigation referred to in the preceding paragraph, establish, to the extent possible, an estimated number of both low and moder-

ate income units which should be constructed in the township each year to provide for the needs as identified in the preceding paragraph.

Defendant shall, upon completion of the analysis set forth in the preceding paragraphs, develop a plan of implementation, that is, an affirmative program, to enable and encourage the satisfaction of the needs as previously set forth. That plan shall include an analysis of the ways in which the township can act affirmatively to enable and encourage the satisfaction of the indicated needs and shall include a plan of action which the township has chosen for the purposes of implementing this program. The adopted plan shall encompass the most effective and thorough means by which municipal action can be utilized to accomplish the goals set forth above.

If for any reason the township shall find that circumstances exist which in any way interfere with or bar the implementation of the plan chosen, it shall set forth in explicit detail:

a. Each and every factor;

b. The way in which each factor interferes with or bars implementation of the plan;

c. Possible alternative plans or municipal action which temporarily or permanently, wholly or in part, eliminate the indicated factor or factors; and

d. The reason why the alternative plans have not been adopted.

To the extent possible, the aforementioned analysis, studies and plans shall be undertaken with the cooperation and participation of plaintiffs and their representatives.

Appendix B

The aforementioned analyses, studies, development of plans and other action shall be completed within 90 days from the date of judgment. The township shall serve copies of the analyses, studies and plans on plaintiffs' attorney and this court within 90 days. The parties shall appear before this court no later than ten days, or on a date set by this court, after service of said papers for a determination of whether defendants have complied with the order of this court and whether further action is necessary.

The judgment entered in this matter as to the invalidity of the zoning ordinance shall not become effective until this court shall decide that sufficient time has elapsed to enable the municipality to enact new and proper regulations for the municipality. *Morris County Land, etc.* v. *Parsippany-Troy Hills,* 40 N. J. 539 (1963).

This court retains jurisdiction until a final order issues requiring implementation of the plan as agreed upon.

APPENDIX C

Final Judgment and Order of the Superior Court of New Jersey, Law Division

Original Filed

June 5, 1972

Mortimer G. Newman, Jr.
Clerk

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Of Counsel
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Superior Court of New Jersey
Law Division
Burlington County

Docket No. L-25741-70 PW

Civil Action

Southern Burlington County N.A.A.C.P., *et al.*,
Plaintiffs,

vs.

Township of Mount Laurel, etc., *et al.*,
Defendants.

Appendix C

This action was tried before the Court sitting without a jury on March 13-16, 1972, the Court having heard, reviewed and considered the proofs taken in open court, and the Court, on May 1, 1972, having rendered its opinion, said opinion being incorporated by reference in this Final Judgment and Order:

IT IS, THEREFORE, on this 30 day of May, 1972, ORDERED that:

1. The zoning ordinance of the Township of Mount Laurel is declared invalid;

2. this determination of the invalidity of said ordinance shall not become effective until the Court shall decide that sufficient time has elapsed to enable the Township of Mount Laurel to enact new and proper regulations for said municipality;

3. upon the entry of this judgment, the Township of Mount Laurel shall immediately undertake a study to identify:

   a. the existing substandard dwelling units in the Township and the number of individuals and families, by income and size, who would be displaced by an effective code-enforcement program;

   b. the housing needs for persons of low and moderate income:

      1. presently residing in the Township and persons who, although not now residing in the Township, were non-transient, past residents of the Township who had resided there for a substantial period of time but who moved from the Township solely because of their substandard living conditions and their inability to find standard low and moderate income housing within the Township;

      2. presently employed by the municipality or in commercial and industrial uses in the Township;

      3. expected or projected to be employed by the municipality or in commercial and industrial uses, the development of which can reasonably be anticipated in the Township.

Appendix C

The defendant shall, upon completion of the analysis set forth in the preceding paragraphs, develop a plan of implementation; that is, an affirmative program, to enable and encourage the satisfaction of the needs as previously set forth. Said plan shall include an analysis of the ways in which the Township can act affirmatively to enable and encourage the satisfaction of said needs and shall include a plan of action which the Township has chosen for the purposes of implementing this program. Said adopted plan shall encompass the most effective and thorough means by which municipal action can be utilized to accomplish the goals as previously set forth.

If for any reason the Township shall find that circumstances exist which in any way interfere with or bar the implementation of the plan, the Township shall set forth in explicit detail:

   a. each and every said factor;

   b. the way in which each said factor interferes with or bars implementation of said plan;

   c. possible alternative plans or municipal action which temporarily or permanently, wholly or in part, eliminate said factors; and

Appendix C

d. the reason why said alternative plans have not been adopted.

To the extent possible, the aforementioned analyses, studies and plans shall be undertaken with the cooperation and participation of plaintiffs and their representatives.

The aforementioned analyses, studies, development of plans and other action shall be completed within ninety (90) days from the date of this Judgment. The Township shall serve copies of said analyses, studies and plans on Plaintiffs' attorney and this Court within ninety (90) days. The parties shall appear before this Court no later than ten (10) days, or on a date set by this Court, after service of said papers for a determination of whether the Defendant has complied with the Order of this Court and whether further action is necessary.

4. all other relief requested by the Plaintiffs is hereby denied;

5. the Court shall retain jurisdiction over this action until such time as a Final Order may be issued requiring implementation of the aforementioned plan as agreed upon.

EDWARD V. MARTINO
A.J.S.C.

Agreement as to form and Entry of the Order:

CARL S. BISGAIER, ESQUIRE
for the Plaintiffs

JOHN F. GERRY, ESQUIRE
for the Defendant Township
of Mount Laurel

APPENDIX D

Order Granting Motion for Leave to File Petition for Rehearing Out of Time

SUPREME COURT OF NEW JERSEY
M-978 September Term 1974

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., *et al.*,
Plaintiffs-Respondents
and Cross-Appellants,

and

ETHEL LAWRENCE, *et al.*,
Plaintiffs-Respondents,

vs.

TOWNSHIP OF MOUNT LAUREL,
Defendant-Appellant
and Cross-Respondent-
Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion to file as within time is granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 24th day of June, 1975.

FLORENCE R. PESHOE
Clerk

APPENDIX E

Order Denying Motion for a Stay

SUPREME COURT OF NEW JERSEY

M-977 September Term 1974

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., *et al.*,

Plaintiffs-Respondents
and Cross-Appellants,

and

ETHEL LAWRENCE, *et al.*,

Plaintiffs-Respondents,

vs.

TOWNSHIP OF MOUNT LAUREL,

Defendant-Appellant
and Cross-Respondent-
Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for stay is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 24th day of June, 1975.

FLORENCE R. PESHOE
Clerk

APPENDIX F

Order Denying Petition for Rehearing

SUPREME COURT OF NEW JERSEY

M-944 September Term 1974

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., *et al.*,

Plaintiffs-Respondents
and Cross-Appellants,

and

ETHEL LAWRENCE, *et al.*,

Plaintiffs-Respondents,

vs.

TOWNSHIP OF MOUNT LAUREL,

Defendant-Appellant
and Cross-Respondent-
Movant.

No member of the Court who voted with the majority having moved for reconsideration the petition is dismissed.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 26th day of June, 1975.

FLORENCE R. PESHOE
Clerk

APPENDIX G

Notice of Appeal

SUPREME COURT OF NEW JERSEY

No. A-11 September Term 1973

TOWNSHIP OF MOUNT LAUREL,

Appellant,

v.

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., CAMDEN COUNTY C.O.R.E., CAMDEN COUNTY N.A.A.C.P., GLADYS CLARK, BETTY WEAL and ANGEL PEREZ,

and

ETHEL LAWRENCE, THOMASINE LAWRENCE, CATHERINE STILL, MARY E. SMITH, SHIRLEY MORRIS and JACQUELINE CUSTIS,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Township of Mount Laurel, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey entered

in this action on March 24, 1975, which judgment modified the judgment of the Superior Court, Law Division, entered in this action on May 30, 1972.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Clyde A. Szuch
Of Counsel To Appellant,
Township of Mount Laurel
Pitney, Hardin & Kipp
570 Broad Street
Newark, New Jersey 07102
(201) 623-1980

Appendix G

Certificate of Service

I, Clyde A. Szuch, a member of the firm of Pitney, Hardin & Kipp, of counsel to the Township of Mount Laurel, Appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of June, 1975, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all other parties required to be served, as follows:

1. On all appellees by mailing a copy, first class postage prepaid, addressed to their counsel of record, Carl Bisgaier, Esq., at his post office address, Department of the Public Advocate Division of Public Interest Advocacy, P. O. Box 141, Trenton, New Jersey 08625.

2. On *Amicus Curiae,* the Public Interest Group of New Jersey, by mailing a copy, first class postage prepaid to Norman Williams, Jr., Esq. at his post office address, 74 Allison Road, Princeton, New Jersey and by mailing a copy, airmail postage prepaid to Norman Williams, Jr., Esq. at his second post office address, 26 River Street, Woodstock, Vermont 05091.

3. On *Amicus Curiae,* Legal Services Housing Task Force, New Jersey State Office of Legal Services, by mailing a copy, first class postage prepaid, to Melville D. Miller, Esq. at his post office address, Middlesex County Legal Service Corporation, 335 George Street, New Brunswick, New Jersey 08901.

Clyde A. Szuch

Supreme Court, U. S.
FILED
SEP 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-38

TOWNSHIP OF MOUNT LAUREL,

Appellant,

v.

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., CAMDEN COUNTY C.O.R.E., CAMDEN COUNTY N.A.A.C.P., GLADYS CLARK, BETTY WEAL and ANGEL PEREZ,

and

ETHEL LAWRENCE, THOMASINE LAWRENCE, CATHERINE STILL, MARY E. SMITH, SHIRLEY MORRIS and JACQUELINE CURTIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF TOWNSHIP OF HOLMDEL, COUNTY OF MONMOUTH, STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

S. THOMAS GAGLIANO,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-38

TOWNSHIP OF MOUNT LAUREL,
Appellant,

v.

SOUTHERN BURLINGTON COUNTY N.A.A.C.P., et. al.,

and

ETHEL LAWRENCE, et. al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PRELIMINARY STATEMENT

The Township of Holmdel, County of Monmouth, a political subdivision of the State of New Jersey, herein presents its brief as *amicus curiae*, in accordance with United States Supreme Court Rule 42(1) and (4), prior to the consideration by this Court of the jurisdictional statement, heretofore filed by the appellant.

INTEREST OF THE TOWNSHIP OF HOLMDEL

The Township of Holmdel, on behalf of its citizens, respectfully requests that this Court hear and consider the substantial issues raised in the within appeal.

The Township of Holmdel is an attractive and principally residential community, located in the County of Monmouth, State of New Jersey, and is typical of many

municipalities of this State. Once mainly a farming community, Holmdel, faced with the population spread of the last twenty years, has attempted, in good faith, to effect comprehensive planning processes and resultant zoning schemes to accommodate and regulate new growth and development patterns, while at the same time preserving the historic bucolic setting of the community. Presently, Holmdel has approximately 1,800 residential units and large areas devoted to agricultural pursuits.

Like many other municipalities in New Jersey, Holmdel has been subjected, in recent years, to protracted and expensive litigation over its zoning provisions. In the first action, *Bayliss, et al. v. Franklin Lakes, et al.*, (Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-33910-71 P.W.), a group of non-resident persons brought suit against Holmdel and four other municipalities claiming that certain zoning provisions were "exclusionary." In February of 1974, this action was dismissed, upon motion by the defendants, for failure to state a justiciable controversy.

In the second action, *Middle Union Associates v. Zoning Board of Adjustment of the Township of Holmdel, et al.*, (Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1149-74 P.W.) a private developer had sought a variance to construct some 700 multifamily units which, by the applicant's own proofs, would be well without the financial reach of low or moderate income persons. After denial by the local zoning agency, the applicant instituted an action seeking review of the administrative determination *and* requesting declaratory judgment relief that the zoning ordinance of Holmdel was unconstitutionally "exclusionary" for failing to make express provision for low and moderate income

persons. Holmdel unsuccessfully challenged the standing of the applicant to raise such constitutional issues, on the ground that the applicant has no interest in such issues.

After trial on the merits, short on the heels of the *Mt. Laurel* decision of the New Jersey Supreme Court here on appeal, the court, constrained by the sweeping directives of *Mt. Laurel*, found the Holmdel zoning ordinance to be unconstitutional and further directed the municipality to amend its zoning ordinance "to provide for a reasonable area or areas where low and middle income housing can be built, including multi-family housing, in an amount of not less than 2100 units"—a consequence which would more than double both the number of residential units and the population of the community. This decision is now on appeal.

Thus, the Township of Holmdel has been most directly affected by the determination of the New Jersey Supreme Court here on appeal, and, therefore, urges that this Court review and consider the substantial constitutional questions raised in this cause.

STATEMENT OF THE CASE

The decision of the New Jersey Supreme Court in *Southern Burlington County NAACP, et al., v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), without precedent or substantial explication, has created broad affirmative duties for municipalities in connection with their delegated powers of zoning and planning. Without a hint of support or substantiation in the New Jersey zoning and planning enabling legislation, *N.J.S.A.* 40:55-1 *et seq.*, the highest court of this State has, in effect, amended the existing legislation so as to mandate express duties and requirements of communities as to certain segments of the population. The impact of this determination is already being felt throughout the State, with hundreds of municipalities faced with uncertainty as to their respective obligations and with the lower courts obviously struggling with their forced intervention into traditionally legislative areas.

In the final analysis, the decision below is grounded upon a common fallacy of recent years—the equating of zoning with housing—thus, labelling zoning as the scapegoat for a panoply of social ills. Stripped to its essentials, the *Mount Laurel* determination, without even supportive suggestion in the constitutional and statutory provisions statedly relied upon, declares a statewide "housing crisis" of such magnitude as to reverse all precedent of judicial reluctance to intrude upon local legislative discretion. All communities falling under the *Mount Laurel* umbrella have presumptive duties to "provide" for a "fair share" of low and moderate income housing. Elemental definitions such as "low and moderate income persons," "developing community," "region" and "fair share" are left vague. Moreover, in stark contravention

of traditional law, the municipality is saddled with a weighty burden of proof to demonstrate its compliance with the *Mount Laurel* mandate.

Equally significantly, the *Mount Laurel* decision, although bottomed only on the facts adduced as to Mount Laurel, purportedly applies to all or most of the municipalities in the State of New Jersey, and will surely be of major significance to the courts of other jurisdictions, both state and federal. Thus, despite the limited factual pattern presented, the New Jersey Supreme Court has, in effect, recast the legislative provisions applicable throughout the state.

In this context, the appeal of Mount Laurel, addressed to this Court, raises substantial legal questions and considerations as to the appropriate role of the judiciary in a traditionally legislative domain.

REASONS FOR THE EXERCISE OF JURISDICTION

Recognizing the reluctance of this Court to pass upon issues addressed principally to questions of local state law, the Township of Holmdel nonetheless urges that the scope and import of the decision of the New Jersey Supreme Court below raises concerns appropriately and urgently addressed to this Court. The Township of Holmdel respectfully submits herein that the *Mount Laurel* decision involves matters far transcending the municipal borders of Mount Laurel and, indeed, beyond the boundaries of New Jersey itself. Equally, the nature of the disposition below is in conflict with the fundamental tenets of governmental structure in this nation, delineating the proper and distinct roles of the legislature and the judiciary. Finally, the breadth and imprecision of the determination below, in effect, prejudges other cases not before the court and, at the same time, casts upon the included communities a duty which, in practical effect, cannot be met. The Township of Holmdel further adopts the views and expressions of the appellant heretofore filed by way of jurisdictional statement.

A. The Issues Raised on Appeal by Mount Laurel are of Paramount Statewide and National Significance.

Historically, issues of zoning and planning were solely matters of local government law, and even the state courts were deferential to the discretionary determinations of municipalities in the exercise of powers delegated by the states. However, in recent years, the courts have gradually shed their traditional role and, flexing "activist" muscles, have increasingly intruded upon the local legislative process, such there appears to evolving a national

law of zoning, eroding earlier parochialism. Indeed, the federal courts also have been increasingly called upon to address zoning issues, which, in prior days were left entirely to the state courts. See, *e.g.*, *Warth v. Seldin*, — U.S. — (43 U.S.L.W. 4906, June 25, 1975); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Construction Industry Association of Sonoma County v. City of Petaluma*, — F.2d — (9th Cir. August 13, 1975); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Steel Hill Development, Inc., v. Town of Sanborton*, 469 F.2d 956 (1st Cir. 1972).

The common thread running through the more recent decisions is the apparent assumption that the courts are capable of dealing with, and are properly empowered to deal with, the broad spectrum of social problems and concerns involving the provision of housing for the nation's disadvantaged. The obvious impracticalities and legal impediments to this assumption are dealt with by oversimplifying the issues, so as to cast the local exercise of the zoning power as the "cause" of the problem—which, in fact, is far more complex of resolution and, at best, only indirectly and tangentially related to zoning. Thus, it is further assumed, the courts, by tinkering with existing zoning provisions, will address and alleviate the housing problem.

This judicial role, it is respectfully submitted, is both simplistic and engages the courts in problems and issues with which they can neither effectively nor properly deal—a role traditionally eschewed by the federal courts and the courts of New Jersey. See *San Antonio Independent School District, v. Rodriguez*, 411 U.S. 1, 32 (1973), *rehearing den.* 411 U.S. 959 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) *cf. Robinson v. Cahill*, 62 N.J. 473, 492, 303 A.2d 273, 290 (1973), *cert. den.* 414 U.S. 976 (1974)

(". . . the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which a State must act."); *Borough of Leonia v. Borough of Fort Lee*, 56 N.J. Super. 135, 144, 151 A.2d 540, 545 (App. Div. 1959) ("The court can only determine whether the ordinance is valid or invalid, and may not determine in behalf of the governing body what the zoning pattern should be."); *Gartland v. Borough of Maywood*, 45 N.J. Super. 1, 5, 131 A.2d 529, 531 (App. Div. 1957) ("The devising of a zoning amendment is not judicial business; we are not asked to sit in with the governing body. Nor are we entrusted with a broad superintendency over the matter."); *Cervase v. Kawaida Towers, Inc.*, 124 N.J. Super. 547, 569, 308 A.2d 47 (Law & Ch. Div. 1973), *aff'd* 129 N.J. Super. 124, 322 A.2d 477 (App. Div. 1974) ("In short, the social or economic belief of a court cannot be substituted for the judgment of officials who are either elected or appointed to exercise that judgment.").

Accordingly, it is respectfully submitted, it is imperative for this Court to hear the within appeal in order to settle the appropriate role of the courts, both state and federal, in such matters.

B. The Disposition in this Cause, by the Supreme Court of New Jersey, Represents a Manifestly Improper Intrusion Upon the Legislative Prerogatives, in Violation of the Constitutional Direction for the Separation of Powers.

The *Mount Laurel* decision here on appeal constitutes a broad amendment to the zoning enabling legislation of New Jersey, imposing express and unprecedented affirmative duties upon municipal governments. The high court of

New Jersey has, in bootstrap fashion, expansively invoked a generalized reference to a goal of the promotion of the "general welfare," and has thereby created broad municipal obligations, without the slightest hint of such legislative intention. It is interesting to note that the New Jersey Supreme Court, in adjudicating the importance of adequate shelter, relies heavily on related local legislation; yet, upon reflection, the court then impliedly finds the existing enactments wanting, and embarks on its own course of legislative drafting.

It must be stressed that the issues on appeal do not merely concern the judicial construction of local statutory provisions by the state courts; the true issues involve the extent to which the judiciary may invade the legislative process and usurp the legislative power. The issue of *Mount Laurel* is not simply the review, from a constitutional standpoint, of a particular manner of zoning provision, see, for instance, *Buchanan v. Warley*, 245 U.S. 560 (1917), nor the articulation of some definable limit on the police power as delegated to the local governments. In sharp contrast, the issue of *Mount Laurel* is whether, and to what extent, the courts are empowered to invent and create "social legislation," however well-intended, in response to the mere bare assertion of the infringement of some purported constitutional right. See *Confederacion de la Raza Unida v. City of Morgan*, 324 F. Supp. 895 (N.D. Calif. 1971); *Commonwealth of Pennsylvania v. County of Bucks*, 8 Pa. Cmwlth. 295, 302 A.2d 897 (Com. Ct. 1973), *cert. den.* 414 U.S. 1130 (1974).

It is well established that it is for the legislature, not the judiciary, to serve as the guardian of the common good by way of social enactments, and that the role of the courts in exercising that power for a public purpose is extremely restricted. See *Berman v. Parker*, 348 U.S. 26,

32-33 (1954); *Steel Hill Development, Inc. v. Town of Sanborton*, above, at 960. Most recently, the Ninth Circuit Court of Appeals has articulated the limited judicial role:

> "If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system .... the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests." *Construction Industry Association of Sonoma County v. City of Petaluma*, above (slip opinion at p. 15).
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> ". . . . To be sure, housing needs in Metropolitan areas like the San Francisco Bay Area are pressing and the needs are not being met by present methods of supplying housing. However, the federal court is not the proper forum for resolving these problems. The controversy stirred up by the present litigation, as indicated by the number and variety of amici on each side, and the complex economic, political and social factors involved in this case are compelling evidence that resolution of the important housing and environmental issues raised here is exclusively the domain of the legislature." *Construction Industry Association of Sonoma County v. City of Petaluma*, above (slip opinion at p. 16, fn. 17).

The decision in *Mount Laurel* rides roughshod over the barrier between the legislative and judicial branches of government. In sum, the *Mount Laurel* determination, however philosophically appealing, constitutes no less than the enactment of zoning legislation by the judiciary.

Even assuming the existence in New Jersey of a "housing crisis," it is not for the courts, in reliance upon amorphous constitutional provisions, to mold broad, and essentially legislative, prescriptions. Such is the traditional, and constitutionally safeguarded, function of the legislature—the voice of the people.

CONCLUSION

The disposition below constitutes a major intrusion into local legislative process and, most pointedly, into the domain of the legislative prerogatives of the State of New Jersey. The decision further thrusts the courts into unprecedented and impracticable regulation of municipal affairs. The issues raised in this appeal are of vital public importance to the entire citizenry of the State of New Jersey and, indeed, to the nation at large, and the Township of Holmdel, therefore, respectfully submits that the appeal be heard and decided by this Court.

Respectfully submitted,

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